(25,509)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 679.

WERNER HORN, APPELLANT,

vs.

JOHN J. MITCHELL, UNITED STATES MARSHAL FOR THE DISTRICT OF MASSACHUSETTS.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

INDEX.

	Original.	Print
Caption	*a*	1
Transcript of record from the district court of the United States for the district of Massachusetts	1	1
Caption	1	1
Petition for writ of *habeas corpus*	2	2
Acknowledgment of service on summons	19	15
Respondent's demurrer to petition of *habeas corpus*	19	15
Hearing on demurrer	21	17
Motion to amend petition for writ of *habeas corpus* (allowed)	21	17
Order of court dismissing petition	22	18
Claim of appeal and allowance thereof	23	18
Opinion, Morton, J.	23	18
Petition for appeal	27	21
Assignment of errors	27	22
Bond on appeal	29	23

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 14, 1916.

	Original.	Print
Citation and acknowledgment of service thereof	31	24
Certificate of clerk of district court	32	25
Order assigning certain judges to sit, &c	33	25
Opinion, Brown, J	35	26
Final decree	43	31
Petition for appeal	45	31
Assignment of errors	47	32
Order *in re* citation	53	34
Bond on appeal	55	34
Citation and service	59	35
Clerk's certificate	61	36

a United States Circuit Court of Appeals for the First Circuit, October Term, 1915.

No. 1154.

WERNER HORN, Petitioner, Appellant,
v.
JOHN J. MITCHELL, U. S. Marshal, Respondent, Appellee.

Appeal from the District Court of the United States for the District of Massachusetts, from Final Decree (Morton, J.), June 28, 1915.

TRANSCRIPT OF RECORD.

Joseph F. O'Connell, James E. O'Connell, Daniel T. O'Connell, for Appellant.
George W. Anderson, U. S. Attorney.
Leo A. Rogers, Special Assistant U. S. Attorney, for Appellee.

Boston: Printed under direction of the Clerk. 1915.

1 United States Circuit Court of Appeals for the First Circuit, October Term, 1915.

No. 1154.

WERNER HORN, Petitioner, Appellant,
v.
JOHN J. MITCHELL, U. S. Marshal, Respondent, Appellee.

Transcript of Record of District Court.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

At a District Court of the United States, Begun and Holden at Boston, within and for the District of Massachusetts, on the fourth Tuesday of June, being the twenty-second day of June, in the year of our Lord one thousand nine hundred and fifteen.

Before the Honorable James M. Morton, Jr., District Judge.

No. 1254. Civil Docket.

In re WERNER HORN, Petitioner for Writ of Habeas Corpus.

The petition in this cause was filed in the clerk's office on the second day of April, A. D. 1915, and was duly entered at the March

Term of this court, A. D. 1915, and is in the words and figures following:—

2 *Petition for Writ of Habeas Corpus.*

[Filed April 2, 1915.]

To the Honorable the Judge of the United States District Court for the District of Massachusetts:

Your petitioner, Werner Horn, commorant in said District of Massachusetts, and a subject of the Empire of Germany, respectfully represents that he is unlawfully held in custody, imprisoned and restrained of his liberty at Cambridge in said district by the respondent John J. Mitchell, United States Marshal for said district.

Your petitioner further represents as follows:—

1. At the February term of the United States District Court for the District of Massachusetts in the year 1915 an indictment was found and returned by the grand jury charging that your petitioner did unlawfully, knowingly, wilfully and feloniously transport, and carry and convey certain explosives contrary to law and in violation of the United States Statutes applicable to the transportation and conveyance of explosives.

2. On March 4th a complaint was filed by John F. A. Merrill, United States Attorney for the District of Maine, with Frank G. Farrington, United States Commissioner at Augusta for the said District of Maine, representing that your petitioner had been indicted as aforesaid and was beyond the jurisdiction of the District Court for the District of Massachusetts, and was in said District of Maine, never having been held to answer said indictment, and was a fugitive from justice of said District of Massachusetts, and praying that your petitioner be apprehended in said District of Maine and held to answer to said indictment, and be further dealt with relative to the same in said District of Massachusetts.

3. Upon said complaint a warrant was issued by said commissioner as prayed for, and, by virtue of said warrant, your petitioner was apprehended and brought before Charles H. Reid, Jr., United States Commissioner for the District of Maine, at Bangor, for a hearing on March 7th, which hearing was continued until March 18, 1915.

4. On February 20, 1915, James Parkinson, an inspector of the dominion police of the Dominion of Canada, and setting forth that he was duly instructed and authorized by the Minister of Justice of

3 the Dominion of Canada, filed with, and made oath to, the Honorable Clarence Hale, Judge of the United States Court for the District of Maine, a complaint, alleging that your petitioner on or about the second day of February, in the year 1915, at the parish of McAdam, York County, in the Province of New Brunswick, in the Dominion of Canada, and within the jurisdiction of His Britannic Majesty, had committed the crime of wilful and unlawful destruction of a part of a railroad bridge belonging to the Canadian-Pacific Railway Company, causing an explosiv

substance to be exploded in or upon said bridge; and the said Parkinson, acting for and in behalf of the aforesaid Dominion of Canada, petitioned for the extradition of your petitioner to the said Dominion of Canada, within the jurisdiction of His Britannic Majesty; that the Honorable Clarence Hale, Judge of the United States District Court for the District of Maine, did, on the aforesaid twentieth day of February, 1915, order the following warrant to issue, and which warrant was issued to John P. S. H. Wilson, United States Marshal for the District of Maine:—

"The President of the United States of America to the Marshal of the United States for the District of Maine, to the Deputies of such Marshal, or any or either of them.

Whereas complaint has been made on oath under the Treaty between the United States of America and Great Britain concluded and signed at Washington, on the 9th day of August, 1842, and of the Convention supplementary to the said Treaty, between the same High Contracting parties, concluded and signed at Washington, on the 12th day of July, 1889, and of the Convention between the same High Contracting parties, concluded and signed at Washington, on the 13th December, 1900, and the ratification thereof exchanged at Washington, on the 22nd day of April, 1901, before me, Clarence Hale, Judge of the District Court of the United States for the District of Maine, that one Werner Horn, or Werner Horne, alias Vernil Horn, did heretofore and on or about the 2nd day of February in the year 1915, at the Parish of McAdam, York County, in the Province of New Brunswick, in the Dominion of Canada, and within the jurisdiction of His Britannic Majesty, commit the crime of wilful and unlawful destruction of a railroad, in destroying a part or portion of a bridge, a part of and belonging to the railroad of the Canadian Pacific Railway Company and used for the purpose of carrying persons and passengers over and upon
4 the same, with intent to render and did render such bridge dangerous or impassable, then and thereby endangering human life; and did also commit the crime of wilful and unlawful obstruction of a railroad, such railroad being the railroad of the Canadian Pacific Railway Company, then and thereby endangering human life, to wit: did on or about the 2nd day of February in the year 1915, at the Parish of McAdam aforesaid, wilfully and unlawfully place in, on or upon a bridge of the Canadian Pacific Railway Company, a part or portion of the railroad of the Canadian Pacific Railway Company, and upon, across and over which such railway company did then convey persons and passengers, an explosive substance and caused such explosive substance to be exploded in, on or upon said bridge, with intent to render, and did render such bridge dangerous, or impassable, whereby and therefrom a part or portion of said bridge was destroyed thereby endangering human life; and did also on or about the said 2nd day of February in the year 1915, at the Parish of McAdam, aforesaid, wilfully and unlawfully cause a substance to be exploded in, on or

upon the said bridge, a part or portion of the railroad of the Canadian Pacific Railway Company, with the intent to render such bridge impassable, and as a result of such explosion obstructed the railroad of the Canadian Pacific Railway Company, upon, across and over the said bridge, and rendered such bridge dangerous or impassable, thereby endangering human life; and that the said Werner Horn, or Werner Horne, alias Vernil Horn, is a fugitive from the Justice of the Province of New Brunswick in the Dominion of Canada, and is now within the District of Maine, in the territory of the United States; and that the crimes with which the said Werner Horn, or Werner Horne, alias Vernil Horn, is herein charged are offences within the treaties between the United States and Great Britain.

Now therefore, we command you forthwith to take the said Werner Horn, or Werner Horne, alias Vernil Horn, and bring him before me, Clarence Hale, Judge of the District Court of the United States for the District of Maine, at the Court Room in the Federal Building, in the City of Portland, in order that the evidence of criminality of the said Werner Horn, or Werner Horne, alias Vernil Horne, may be heard and considered and if deemed sufficient to sustain the charge that the same may be certified together with a copy of all the proceedings to the Secretary of State that a warrant may issue for his surrender pursuant to the said Treaties.

Witness my hand this twentieth day of February, in the year of our Lord One Thousand Nine Hundred and Fifteen.

[LEGAL SEAL.] CLARENCE HALE,
Judge United States District Court
for the District of Maine."

5. At a hearing before United States Commissioner Reid on March 18, 1915, your petitioner refused to plead to said indictment described in paragraphs 1, 2, 3 and 4, and through counsel denied the jurisdiction of the said Commissioner and of the United States courts to arraign or punish him for the offences charged in the aforesaid indictment, and in lieu of pleading to the said indictment offered the following special plea:

"Now comes the defendant in the above entitled case and respectfully demands that he be released for the following reasons:

1. That he is a German subject and an officer in the German Army to wit, a First Lieutenant, in the division of the German Army known as Landwehr—District IV Berlin.

2. That there is a state of war between Great Britain and Germany and that both governments are entitled to all rights given by law to sovereign governments when in a state of belligerency.

3. That under the law of nations soldiers and members of one belligerent nation may seize, destroy or capture the property of the other belligerent nation wherever found, except in neutral territory.

4. That the Commission of an officer in any army of a belligerent power authorizes him to engage in every act of hostility against other belligerents permissible under the laws of nations.

5. That the defendant has been accused with having damaged a

bridge within the territory of the Province of New Brunswick, a part of the possessions of Great Britain.

6. That the defendant being a commissioned officer cannot be regarded as a criminal by any neutral nation; for he is innocent of any offence against international law even though committed against the municipal laws of the United States.

7. That the counts in the indictment charge the defendant with offences which are necessarily connected with and part of the aforesaid destruction of the bridge in the possession of the British Government, and that whatever the defendant may have done in connection with damaging the aforesaid bridge by the improper
6 use of United States territory, does not deprive him of this belligerent character and the rights attached thereto.

8. The counts in the indictment on which the order of arrest was made which brings the defendant before this court are cognizable only by the law of nations, and he is necessarily free from liability and punishment by the courts of the United States Government."

This plea was not traversed by the United States.

The Commissioner refused to consider the said plea until evidence was offered in support of it.

Your petitioner refused to plead otherwise than by said special plea, whereupon the said Commissioner entered a plea of "not guilty" for him.

6. The United States Government offered a copy of the indictment and warrant above mentioned with the marshal's return thereon and rested.

7. Your petitioner then admitted that he was the Werner Horn mentioned in said indictment and complaint, and introduced the following affidavit in evidence in support of his special plea, which affidavit was duly admitted:

"I am a native of Prussia, and a citizen of the German Empire, to which I owe allegiance, and am thirty-seven years of age.

The Constitution of Germany provides that all members of the Landwehr, of which I am a member, owe certain prescribed duties to the German Empire in times of war; and as one subject to service in the Landwehr and as a former officer for a period of twelve years in the regular army of Germany, to wit, the 17th Prussian Regiment, I am, and have been since the twenty-eighth day of July, when war was declared between Great Britain and Germany, an officer in the Landwehr Division of the German Army.

I cannot produce my commission because it has unwarrantably been taken from my possession by United States officials, and is now in the possession of the district attorney of the United States for the district of Massachusetts, but I submit a photographic copy of said commission, reserving the right to put in further evidence as to my standing in the German army in such manner as may be proper.

Whatever has been done by me whilst in the United States and in connection with the destruction of the bridges at Vanceboro has been done under my authority as an officer in the German army.

7 I have not violated the laws of the United States of America.

The bridge at Vanceboro was used by the British government for the transportation of vast stores of ammunition, implements of war, foodstuffs and other materials used entirely by the British government in their efforts to defeat the German army, of which I am an officer.

Whatever was done by me was simply for the purpose of preventing such supplies from reaching the British army, my country's enemy.

I am not in any way subject to any of the municipal laws of the United States for anything that I did in connection with the blowing up of this bridge, and this indictment charges me with an offense inseparable to the blowing up of said bridge.

I am a belligerent connected with the German army, and entitled by the law of nations to all the rights of the belligerent soldier, and therefore not at all subject to the municipal laws of this nation.

WERNER HORN.

BANGOR, March 18, 1915.

Then personally appeared the above named subscriber who being duly sworn on oath declares that the above statements made by him are true. Before me,

TERENCE B. TOWLE,
Notary Public."

8. Your petitioner further offered evidence which was received, as follows:—

(*a*) The proclamation of the President of the United States issued under date of August 5, 1915, recognizing that a state of war existed between the nations of Germany and Great Britain, and that both of said nations were recognized as belligerents.

(*b*) The Imperial German Constitution which provides that all male subjects, up to and including the age of thirty-nine, in the case of war must perform the military duty of their rank.

(*c*) Through his affidavit that he is thirty-seven years of age, he therefore came within the requirements of the aforesaid constitution.

(*d*) A photographic copy of your petitioner's commission as a first lieutenant in the Landwehr Division of the Imperial German army, which commission bore the imperial seal and signature of the Emperor of Germany; and the fact that the original was in possession of the United States Attorney for the District of Massachusetts.

(*e*) The official rank list of the Imperial German Army
8 setting forth the name and rank of petitioner as an officer of the said army, also official statement of the fact that your petitioner had performed twelve years' service as an active officer in the said army.

9. Your petitioner also offered in evidence, which was received, that:

(*a*) That at or about 7:15 a. m. February 2, 1915, your petitioner was arrested at Vanceboro, Maine, within the County of Washington, and State of Maine, by a deputy sheriff of said county, in connection with the explosion of the international bridge at 1 a. m., February 2, 1915.

(*b*) That your petitioner at the time of his arrest declared he was an officer in the Germany army and would not harm anyone in the United States.

(*c*) That your petitioner at the time of his said arrest had attached to his clothing a flag of his country, to wit, the flag of Germany.

(*d*) That present when the said arrest was made were police officers of the Dominion of Canada.

(*e*) That the international bridge which was damaged was used for conveying munitions of war into Canada.

10. Your petitioner then offered to prove that, in answer to questions of the deputy sheriff who arrested him, that he stated:—

(*a*) That Great Britain was at war with Germany, and was an enemy to his country, to wit, Germany.

(*b*) That the international bridge described in paragraph nine was being used by the enemy of his country to transport munitions of war to his country's enemy.

(*c*) That he was acting as a belligerent soldier of a belligerent nation.

Against the objection of your petitioner, the evidence based on the aforesaid offer of proof was excluded, in violation of the rights of your petitioner.

11. Your petitioner then offered to prove that an act of war had been committed on the Canadian side of the international bridge (more specifically described in paragraph nine), which act was a part and parcel of the crime alleged in the aforesaid indictment; and, in connection with said offer of proof, offered in evidence the following:—

(*a*) Testimony of John P. S. H. Wilson, United States Marshal for the District of Maine, that he had in his possession a
9 warrant for the arrest of your petitioner, issued by the Honorable Clarence Hale, United States District Judge for the District of Maine, on the twentieth day of February, 1915, upon complaint made by James Parkinson, an inspector of the dominion police of the Dominion of Canada, seeking the extradition of your petitioner to the Dominion of Canada upon allegations that your petitioner had on the second day of February, 1915, caused injuries to the aforesaid bridge at a part or portion thereof situated within the aforesaid parish of McAdam, and Dominion of Canada, and that your petitioner was a fugitive from the justice of the Province of New Brunswick and Dominion of Canada.

(*b*) Copies of the complaint made by the aforesaid James Parkinson and the warrant issued by the said United States Judge Clarence Hale.

Against the objection of your petitioner, the foregoing described

evidence, based upon offer of proof, was excluded, in violation of the rights of your petitioner.

12. Your petitioner then offered to prove:—

(*a*) Representatives of the United States Department of Justice had unlawfully and without due process of law broken into a trunk owned by your petitioner and located at the Arietta Hotel, Staten Island, in the County of Richmond and State of New York, and removed therefrom papers, documents and articles which were the property of your petitioner and essential and necessary for his use at the hearing then in progress, in setting forth his defence.

(*b*) That the sheriff of Washington County in the State of Maine, responding to a duces tecum summons, had appeared before the United States grand jury for the District of Massachusetts, at the session held at Boston, Massachusetts, and at which the indictment above set forth was returned, and produced certain papers, documents and articles, more particularly a German flag, all of which had been the property of your petitioner; that the United States Attorneys had unlawfully and without due process of law refused to return the said papers, documents and articles to the said sheriff who had demanded their return, and held the same without right.

(*c*) That demand had been made at Boston, Massachusetts, on the United States Attorney for the District of Massachusetts for the production at the hearing then in progress of the papers, documents and articles referred to in clauses (*a*) and (*b*) of this paragraph, which demand was refused.

(*d*) That the United States Attorney for the District of Massachusetts was represented by his first assistant; that the said first assistant United States Attorney for the District of Massachusetts stated to the United States Commissioner that it was admitted that the United States Attorney for the District of Massachusetts had acquired possession of papers, documents and articles such as are referred to in clauses (*a*) and (*b*) of this paragraph, and had refused to comply with the demand of your petitioner to produce them.

And your petitioner says that the United States Attorneys, in withholding the aforesaid evidence and refusing to produce said papers, documents and articles, deprived your petitioner of a fair trial, all in violation of his rights under the Constitution and laws of the United States and existing treaties between the United States and the Empire of Germany and the Kingdom of Prussia.

13A. The only evidence offered by the United States at said hearing comprised the copy of the indictment and warrant with the marshal's return thereon, as referred to in paragraph six.

13B. That the said United States Commissioner disregarding the rights of your petitioner arbitrarily overruled said special plea, which not having been traversed by the United States, and which was supported by affidavit and evidence that was not controverted, contradicted or denied, and which was therefore conclusive and binding, thus establishing the right of your petitioner to be discharged, inasmuch as his act charged in said indictment was an act of war which the United States Court sitting at Boston had no

jurisdiction over, but which act was subject only to the laws of nations.

14. In accordance with the aforesaid order, the said Commissioner made an order committing your petitioner to the custody of John S. P. H. Wilson, United States Marshal for the District of Maine, ordering your petitioner to furnish bail in the sum of ten thousand dollars, for his appearance before the District Court of the United States for the District of Maine, and upon failure so to furnish bail, ordered your petitioner committed to the Cumberland County jail in Portland in said district.

11 15. On the twenty-third day of March, A. D. 1915, Hon. John F. A. Merrill, United States Attorney for the District of Maine, petitioned the District Court for the District of Maine, praying that the Honorable Court issue a warrant directed to the United States Marshal of the Maine district to remove your petitioner to the District of Massachusetts and there surrender him to the United States Marshal of the latter district, there to be dealt with according to law.

16. That on the twenty-third day of March, A. D. 1915, the Honorable William L. Putnam issued the following order:

"UNITED STATES OF AMERICA,
District of Maine, ss:

March 23, 1915.

It is hereby ordered that hearing be had upon the within petition upon the twenty-fifth day of March, 1915 at ten o'clock in the morning, and that notice be given forthwith to the said Werner Horn by the Marshal of this District, or his Deputy, by giving him in hand a copy of the within petition and of this Order, all duly certified by the Clerk of this Court, and that the said Marshal or his Deputy, have the said Werner Horn before this Court upon said twenty-fifth day of March at ten o'clock in the morning, and that the said Marshal or his Deputy make return of his doings to this Court.

WILLIAM L. PUTNAM,
Assigned to Hold December Term, 1914,
United States District Court, Maine District.

Dated at Portland, this twenty-third day of March in the year of our Lord one thousand nine hundred and fifteen."

A copy of the foregoing order duly certified by James E. Hewey, clerk of the United States District Court for the District of Maine, was served on your petitioner on said twenty-third day of March, A. D. 1915.

17. On the said twenty-fifth day of March, A. D. 1915, your petitioner, at 9.30 a. m., filed with the clerk of the United States District Court for the District of Maine a petition for the issuance of a habeas corpus writ and asked that the same be received and immediately submitted to the Honorable William L. Putnam, the Judge assigned to hold the session of the United States Court for the District of

Maine at which your petitioner was ordered to appear; that the same
clerk of court refused to accept the said petition, giving as his
12 reasons therefor that the said William L. Putnam had or-
dered that habeas corpus petitions could not be accepted by the said clerk until first submitted to the said Judge Putnam and by him ordered to be filed; that the said Judge William L. Putnum was then notified by the Honorable United States Attorney that your petitioner desired to be heard on his habeas corpus petition, prior to the convening of the session of court and consideration of the petition for removal of your petitioner to Massachusetts; that the said Judge William L. Putnam, without warrant of law and in violation of rights guaranteed to your petitioner by the Constitution and laws of the United States and existing treaties between the United States and the Empire of Germany and the Kingdom of Prussia, refused then and there to hear your petitioner, or to give any consideration to his habeas corpus petition; all of which occurred prior to ten o'clock a. m. on the said twenty-fifth day of March, A. D. 1915.

18. That when the session of court opened at 10 o'clock a. m. on said twenty-fifth day of March, A. D. 1915, your petitioner immediately, and prior to any consideration whatsoever being given to the petition for removal described in paragraph fifteen, seasonably presented his petition for the issuance of a writ of habeas corpus and asked that he be heard in relation to the same, and that the said petition be duly filed and considered, in accordance with law and rights guaranteed to your petitioner; that the said Judge William L. Putnam without warrant of law and in violation of the rights guaranteed to your petitioner by the Constitution and laws of the United States and existing treaties between the United States and the Empire of Germany and the Kingdom of Prussia, refused to allow said habeas corpus petition to be filed, presented or considered; that it was stated to the said Judge William L. Putnam by your petitioner that the said Judge William L. Putnam was the only judge of the United States courts then within the jurisdiction of the United States Court for the District of Maine, and his refusal to receive, permit to be filed, or to consider the said habeas corpus petition, unlawfully, and in violation of the rights of your petitioner, deprived the latter of being heard prior to the beginning of proceedings growing out of the petition for the removal of your petitioner to Massachusetts and the issuing of the warrant of removal
therein prayed for by the United States Attorney; but that
13 despite the foregoing described demands for a hearing, and
further protests against the refusal of the said Judge William L. Putnam to consider the said habeas corpus petition, the said Judge William L. Putnam violated the rights of your petitioner guaranteed by the Constitution and laws of the United States and existing treaties between the United States and the Empire of Germany and the Kingdom of Prussia, and thereby denied your petitioner due process of law.

19. That on the said twenty-fifth day of March, A. D. 1915, the

said Judge William L. Putnam issued an order directing the marshal to remove your petitioner to the jurisdiction of the District Court of Massachusetts.

20. That subsequent to the issuance of the order referred to in paragraph nineteen it was ascertained that the Honorable Clarence Hale, judge of the United States Court for the District of Maine, would be within the jurisdiction of said court at or about 4.25 o'clock p. m. of the same day, to wit, March 25, 1915; that at that hour your petitioner was within said jurisdiction, viz., confined at the Cumberland County jail, Portland, Maine.

21. That at or about 4.25 o'clock p. m. your petitioner presented to the said Honorable Clarence Hale a petition for the issuance of a writ of habeas corpus, and asked that the same be accepted, ordered filed and considered forthwith, or that an order issue restraining the removal of your petitioner from the jurisdiction of the United States Court for the District of Maine until a hearing was had at such time and place as the said Honorable Clarence Hale directed; that the said Honorable Clarence Hale, without due process of law and in violation of the rights guaranteed to your petitioner by the Constitution and laws of the United States and existing treaties between the United States and the Empire of Germany and the Kingdom of Prussia, refused to give any consideration to said petition; that it was brought to the attention of the said Honorable Clarence Hale that earlier in the day the Honorable William L. Putnam refused to consider the said petition, that no United States judge other than the said Judge Putnam and himself were then within the jurisdiction of Maine, and that the refusal of the said Judge Hale to act or give any consideration to the said petition would result in your petitioner being wrongfully removed at or about 6.05 o'clock
14 p. m. by the United States Marshal, to the District of Massachusetts; that such a course of action, in the face of your petitioner's repeated demands to be heard on his habeas corpus petition, unjustly, unfairly, unconstitutionally, without due process of law and in violation of existing treaties between the United States and the Empire of Germany and the Kingdom of Prussia, deprived your petitioner of his right to be heard on such habeas corpus petition seeking release from custody and his liberty, as provided in Section 753, Revised Statutes of the United States of America, which provides for habeas corpus writ to issue when a person who claims to be a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done under any alleged right, title, authority, privilege, protection or exemption claimed under the commission of any foreign state, or under any color thereof, the validity and effect whereof depend upon the law of nations.

22. That subsequent to the refusal of the Honorable Clarence Hale to consider the aforesaid habeas corpus petition, your petitioner was removed from the Cumberland County jail at Portland, Maine, by John S. P. H. Wilson, United States Marshal, and thence removed to Boston, Massachusetts, within the jurisdiction of the United States Court for the District of Massachusetts; all in violation of rights guaranteed to him by the Constitution and laws of the United

States and existing treaties between the United States and the Empire of Germany and the Kingdom of Prussia; that at said Boston, Massachusetts, your petitioner was, by the said United States Marshal Wilson, given into the custody of Guy Murchie, then United States Marshal for the District of Massachusetts, and by him imprisoned in the Middlesex County jail at Cambridge, Massachusetts, within the jurisdiction of the District Court of the United States for the District of Massachusetts. That on the twenty-sixth day of March, A. D. 1915, your petitioner was brought before the Honorable James M. Morton, Jr., Judge of the United States District Court for the District of Massachusetts, to plead to the indictments found against him by the United States grand jury for the District of Massachusetts; and that a continuance to Monday, April 5, 1915, in the matter of your petitioner entering a plea was ordered; and your petitioner was ordered to furnish bail in the sum of $10,000,
15 or in lieu thereof to stand committed in the custody of the United States Marshal for the District of Massachusetts; that in pursuance of the aforesaid order your petitioner is now confined in the Middlesex County jail at Cambridge, Massachusetts, within the jurisdiction of the District Court for the District of Massachusetts.

23. On the first day of April, A. D. 1915, the term of office of the aforesaid Guy Murchie, United States Marshal for the District of Massachusetts, was ended, and he was succeeded as United States Marshal for the said district by the respondent John J. Mitchell, who duly qualified for the duties thereof.

24. Your petitioner is now held in custody of the respondent under color of the order of commitment issued on March 26, 1915, by the United States District Court for the District of Massachusetts, more fully described in paragraph twenty-two; but that said order of commitment is irregularly based upon the order irregularly issued on the twenty-fifth day of March, A. D. 1915, by the Honorable William L. Putnam, commanding the surrender of your petitioner by the United States Marshal for the District of Maine to the respondent, and the order of the said Honorable William L. Putnam is based upon the irregular order of the aforesaid Charles H. Reid, Jr., United States Commissioner; furthermore, that the irregular order issued by the said Honorable William L. Putnam, which order your petitioner says deprived him of rights guaranteed by the Constitution and laws of the United States and existing treaties between the United States and the Empire of Germany and the Kingdom of Prussia, to wit, right to be heard on his habean corpus petition for the issuance of a writ of habeas corpus prior to his removal from the jurisdiction of the United States Court for the District of Maine, application for the consideration of which was seasonably made to the Honorable William L. Putnam and the Honorable Clarence Hale, both judges of the United States courts.

25. Said order of commitment is null and void and in violation of the rights of your petitioner under the Constitution and laws of the United States and existing treaties between the United Sates and the Empire of Germany and the Kingdom of Prussia, because the afore-

said Charles H. Reid, Jr., United States Commissioner at Bangor, Maine, refused to receive certain evidence offered in behalf of your petitioner, which would have established his innocence,
16 thereby refusing to permit your petitioner to show that he was not guilty of the offense charged in the indictment then before him, or to show that there existed any probable cause that he committed any offense over which the said District Court of Massachusetts had any jurisdiction.

26. That the said order of commitment is null and void and in violation of the rights of your petitioner under the Constitution and laws of the United States and existing treaties between the United States and the Empire of Germany and the Kingdom of Prussia, because the said United States Commissioner Charles H. Reid, Jr., refused to consider the special plea to the jurisdiction of the United States and to its lawful authority to hold your petitioner on the warrant then before the said Commissioner.

27. That the said order of commitment is null and void and in violation of the rights of your petitioner under the Constitution and laws of the United States and existing treaties between the United States and the Empire of Germany and the Kingdom of Prussia, because your petitioner was denied a fair trial, in that the United States Attorneys refused to produce at said hearing held before the said Charles H. Reid, Jr., papers, documents and articles which were the property of your petitioner and had been unlawfully taken from his possession by representatives of the Department of Justice of the United States, and other papers, documents and articles which were the property of your petitioner, and had by sundry methods and devices been brought into the possession of the United States Attorneys; and that the refusal of the United States Attorneys to produce said papers, documents and articles deprived your petitioner of the right to present evidence essential to the establishment of his defense.

28. That said order of commitment is null and void and in violation of the rights of your petitioner under the Constitution and laws of the United States and existing treaties between the United States and the Empire of Germany and the Kingdom of Prussia, because the clerk of the United States District Court for Maine refused to receive and enter the petition for the issuance of a habeas corpus writ, seasonably offered by your petitioner prior to the beginning of the proceedings in relation to the petition for removal described in paragraph fifteen.

29. That said order of commitment is null and void and in
17 violation of the rights of your petitioner under the Constitution and laws of the United States and existing treaties between the United States and the Empire of Germany and the Kingdom of Prussia, because the Honorable William L. Putnam refused to receive, enter or consider the petition for the issuance of a writ of habeas corpus, seasonably offered by your petitioner prior to the beginning of the proceedings in relation to the petition for removal described in paragraph fifteen.

30. That said order of commitment is null and void and in violation of the rights of your petitioner under the Constitution and laws

of the United States and existing treaties beween the United States and the Empire of Germany and the Kingdom of Prussia, because the Honorable Clarence Hale, Judge of the United States Court for the District of Maine, refused to consider the petition for the issuance of a habeas corpus writ seasonably presented by your petitioner prior to his removal from the jurisdiction of the United States Court for the District of Maine.

31. That said order of commitment is null and void and in violation of the rights of your petitioner under the Constitution and laws of the United States and existing treaties between the United States and the Empire of Germany and the Kingdom of Prussia, because your petitioner was removed from the jurisdiction of Maine under color of a warrant issued to the United States Marshal of the District of Maine by the Honorable William L. Putnam and enforced without due process of law having been exercised or considered by the said Honorable William L. Putnam, or the said Clarence Hale.

32. That said order of commitment is null and void and in violation of the rights of your petitioner under the Constitution and laws of the United States and existing treaties between the United States and the Empire of Germany and the Kingdom of Prussia, because the warrant of removal issued by the Honorable William L. Putnam, March 25, 1915, was based upon an order made by the United States Commissioner at Bangor, which in turn was founded upon irregular proceedings having the force and effect of depriving your petitioner of rights guaranteed to him by the Constitution and laws of the United States and existing treaties between the United States and the Empire of Germany and the Kingdom of Prussia.

18 33. That said order of commitment is null and void and in violation of the Constitution and laws of the United States and existing treaties between the United States and the Empire of Germany and the Kingdom of Prussia, because under the Constitution of the United States, Article 1, Section 9, it is provided:

"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it."

And the refusal of the said Judges Putnam and Hale to consider the petition for the issuance of a writ of habeas corpus presented to them March 26, 1915, prior to the removal of your petitioner to Massachusetts, operated as a suspension of said writ, thereby violating the provision of the aforesaid Constitution and permitting the unlawful removal of your petitioner from the jurisdiction of the United States District Court for the District of Maine, within which district your petitioner had seasonably presented his petition praying that the rights guaranteed him by the Constitution and laws of the United States and existing treaties between the United States and the Empire of Germany and the Kingdom of Prussia be respected and enforced.

34. That said order of commitment is null and void and in violation of the rights of your petitioner under the Constitution and laws of the United States and existing treaties between the United States and the Empire of Germany and the Kingdom of Prussia, because

on the twenty-sixth day of March, A. D. 1915, his arraignment before the United States Court for the District of Massachusetts was made possible only after your petitioner had been denied his rights within the jurisdiction of the United States District Court for the District of Maine by the justices and officers of the United States courts, as more fully described in preceding paragraphs.

Your petitioner therefore prays that a writ of habeas corpus be issued out of and under the seal of this Honorable Court to be directed to the respondent, commanding him to have the body of your petitioner, together with return of the date and cause of his detention, before this Honorable Court on a day to be designated therein, to the end that your petitioner may be discharged from the custody and imprisonment aforesaid.

WERNER HORN.

19 DISTRICT OF MASSACHUSETTS, *ss:*

APRIL 2, 1915.

Personally appeared the above-named Werner Horn and made oath that he has read the foregoing petition by him subscribed and knows the contents thereof, and that the averments contained therein are true.

Before me,

DANIEL T. O'CONNELL,
Notary Public.

Upon the filing of this petition, a summons was issued to John J. Mitchell, United States Marshal for the District of Massachusetts, to appear before said court on Monday, the fifth day of April, 1915, at 2 o'clock P. M., to show cause, if any he had, why a writ of habeas corpus should not issue for the body of Werner Horn, and the marshal acknowledged service thereon, as follows:

Acknowledgment of Service on Summons.

BOSTON, April 2, 1915.

Due and sufficient service of the within summons is hereby acknowledged.

JOHN J. MITCHELL,
United States Marshal.

On the tenth day of said April the following Demurrer was filed by respondent:—

Respondent's Demurrer to Petition for Habeas Corpus.

[Filed April 10, 1915.]

To the Honorable the Judge of the United States District Court for the District of Massachusetts:

And now comes the respondent in the above-entitled cause and demurs to the petition, and assigns as causes for demurrer the following:

(1) In that it appears from the petition that said petitioner is now and has been since the twenty-sixth day of March, 1915, commorant at Boston in the District of Massachusetts, within the judicial district of the United States District Court for the District of Massachusetts, and that said petitioner has been and is now being held at said Boston by the respondent, as he is United States Marshal for said District of Massachusetts, by virtue of an order of the United States District Court for the District of Massachusetts for his appearance before said court to answer to certain indictments found against him by a grand jury of the United States for said District of Massachusetts, it being nowhere alleged that said United States District Court for the District of Massachusetts is without jurisdiction of the offenses alleged in said indictments;

(2) In that it does not appear from the facts alleged in the petition that the United States Commissioner at the hearing upon the question of probable cause in the District of Maine had no jurisdiction of the offenses set forth in the indictment referred to in paragraph one of the petition;

(3) In that it does not appear from the petition that any competent evidence offered by the petitioner was rejected upon hearing before the United States Commissioner in said District of Maine;

(4) In that it does not appear from the facts alleged in the petition that the said Commissioner at said hearing denied the petitioner any legal right or denied him due process of law in finding that there was probable cause for believing the petitioner guilty of the offense alleged in the indictments referred to in paragraph one of the petition;

(5) In that it does not appear from the facts alleged in the petition that the petitioner was denied due process of law or any other right, privilege or immunity granted him by the Constitution and laws of the United States or any right secured by any existing treaty between the United States and any foreign nation upon the hearing accorded him upon the petition for his removal from the District of Maine to the District of Massachusetts;

(6) In that it does not appear from the facts alleged in the petition that the petitioner was denied due process of law or any right, privilege or immunity granted him by the Constitution and laws of the United States or by any existing treaty between the United States and any foreign nation by the order referred to in paragraph nineteen of the petition, directing the removal of the petitioner to the District of Massachusetts;

(7) In that it does not appear from the petition that said Honorable William L. Putnam had jurisdiction to entertain the petition for habeas corpus referred to in paragraph seventeen of the petition or that the refusal of said Honorable William L. Putnam to hear said petition for habeas corpus constituted any invasion of any legal right of the petitioner;

(8) In that it does not appear from the facts alleged in the petition that the refusal of Honorable Clarence Hale, Judge of the United States District Court for the District of Maine, in declining to hear the petition for habeas corpus, as alleged in paragraph twenty-one of

the petition, denied the petitioner due process of law or any right, privilege or immunity granted him under the Constitution and laws of the United States, or by any treaty between the United States and any foreign nation;

(9) In that it appears from the petition that the petitioner is now in the lawful custody of the respondent.

By His Attorneys, GEORGE W. ANDERSON,
U. S. Att'y,

By LEO A. ROGERS,
Ass't U. S. Att'y.

I, Leo A. Rogers, attorney for the respondent, certify that the foregoing demurrer is, in my opinion, well founded in law, and that the same is not intended for delay.

LEO A. ROGERS.

On the twenty-third day of April, A. D. 1915, this cause came on to be heard on the foregoing demurrer and was fully heard by the court, and on the eleventh day of May an opinion of the court was announced, dismissing petition.

On the seventh day of June, A. D. 1915, the following Motion to Amend Petition for Writ of Habeas Corpus was filed:

Motion to Amend Petition for Writ of Habeas Corpus.

[Filed June 7, 1915.]

To the Honorable the Judge of the United States District Court for the District of Massachusetts:

And the said Werner Horn in his own proper person comes into court here and moves to amend his petition for writ of habeas
22 corpus as previously filed by him by adding on page 19 [printed page 18] thereof the following paragraph to be designated as paragraph 35:

35. That your petitioner is an officer in the army of the Empire of Germany, to wit, a first lieutenant in the division of the aforesaid army known as the Landwehr; that a state of war exists between the Empires of Great Britain and Germany, which state of war has been recognized by the President of the United States in an official proclamation; that your petitioner is accused of destroying part of the international bridge in the township of McAdam, Province of New Brunswick and Dominion of Canada; that he is now held in custody by the respondent on the charge of carrying explosives illegally, which allegation if true is inseparably connected with the destruction of the said bridge; that he is a subject and citizen of the Empire of Germany and domiciled therein and is being held in custody for the aforesaid act which was done under his right, title, authority, privilege, protection and exemption claimed under his commission as said officer as described aforesaid.

WERNER HORN.

DISTRICT OF MASSACHUSETTS, ss:

JUNE 5, 1915.

Personally appeared the above-named Werner Horn and made oath that he has read the foregoing amendment to petition by him subscribed and knows the contents thereof, and that the averments contained therein are true, before me,

DANIEL T. O'CONNELL,
Notary Public.

On the eleventh day of said June, the foregoing motion to amend petition was allowed by the court.

This cause was thence continued to the present June Term, A. D. 1915, when, to wit, June 28, 1915, the following Order Dismissing Petition is entered:

Order Dismissing Petition.

June 28, 1915.

MORTON, *J.:*

The above-entitled matter having come on to be heard on the petition for the issuance of a writ of habeas corpus and the demurrer and amendment thereto, it is now, to wit, June 28, 1915, ordered that said petition be dismissed.

By the Court,

WILLIAM NELSON, *Clerk.*

23 From the foregoing order of court, the petitioner claims an appeal to the United States Circuit Court of Appeals, and gives good and sufficient security that he will prosecute his appeal to effect and answer all damages and costs if he fail to make his plea good, and said appeal is allowed accordingly.

A true record:
Attest:
WILLIAM NELSON, *Clerk.*

Opinion of the Court.

May 11, 1915.

MORTON, *J.:*

This — a petition for habeas corpus brought against the United States Marshal for this district. An order of notice issued to show cause why the writ should not issue. The respondent has demurred in writing, assigning various causes which amount to a general demurrer.

A preliminary question is whether a demurrer lies to a petition for habeas corpus. It is contended by the petitioner that it does not, and that the court should not consider such cases except upon the actual facts as established at a hearing. This petition is unusually full and explicit. I see no reason to doubt that it sets forth accu-

rately and completely the substantial facts upon which the petitioner relies. No request to amend it has been made on his behalf; and it has not been suggested that any further material facts would or might be developed upon a hearing. It may be assumed, as was done in Frank's case (infra), that the petition states all facts helpful to the prisoner. I greatly doubt whether a formal demurrer is necessary or proper in a case heard upon a petition and an order to show cause why the writ should not issue. In view of Revised Statutes, Section 755, it is, I think, sufficient if the respondent orally demurs or, what amounts to the same thing, suggests to the court that the petition does not state a case entitling the petitioner to the writ. This was, apparently, the course followed in Leo M. Frank's case (U. S. Supreme Court, April 19, 1915), and is the general practice in the Supreme Judicial Court of Massachusetts. "Under Section 755 Revised Statutes, it was the duty of the Court to refuse the writ if it appeared from the petition itself that the appellant was not entitled to it." Pitney, J., in Frank's case, supra. To the same
24 effect, aside from any statute, was the opinion of Shaw, C. J., in Sim's case, 7 Cushing 285, at 293. See too In re Boardman, 169 U. S. 39; and Ex parte Baer, 177 U. S. 378. I therefore proceed to consider whether upon the facts stated in the petition sufficient cause appears for granting the writ.

Two principal contentions are made by the petitioner; first, that he is not subject to prosecution on the indictment which has been found against him in this district, because he is an officer of the German army and committed the acts alleged to be violations of our criminal law in connection with an attack upon British territory; second, that the removal proceedings under which the petitioner was taken from the District of Maine, where he was first arrested, into this district, were illegal and in violation of his rights.

As to the first: It appears from the petition that the petitioner is now confined under an order of this court directing that he furnish bail to answer to said indictment, and that, in default thereof, he stand committed. No formal defect or irregularity affecting this order is alleged. The indictment charges that the petitioner illegally transported explosives interstate from New York to Boston, and from Boston to Vanceboro. The petition alleges that this transportation was "necessarily connected with and part of the aforesaid destruction of the bridge (near Vanceboro in British territory) in the possession of the British government." The issues involved in a criminal prosecution cannot, generally speaking, be anticipated and tried out upon a petition for habeas corpus. All questions raised by the petitioner on this branch of this petition are open to him in the criminal case and can be determined in connection therewith. Apart from statute, therefore, the petitioner's first contention is plainly unfounded. A similar question arose in People v. McLeod, 25 Wendell, 483, 568; and it was there held that the writ ought not to issue before the indictment had been tried. While some portions of the opinion in that case have been much criticised, it has not, so far as I am aware, been seriously doubted upon this point.

The petitioner contends, however, that under Revised Statutes, Section 753, passed since the McLeod case, he is, of right, entitled to

have the question of his immunity from prosecution on ac-
25 count of his alleged connection with the German army determined upon habeas corpus proceedings. That section reads as follows:

"The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

The part of this section relating to subjects and citizens of foreign states was passed because of the McLeod case and was designed to give jurisdiction of such matters to the Federal courts. It does not seem to me that it gives to such subjects or citizens more absolute rights to habeas corpus than to the classes of prisoners specified therein.

Assuming, however, that the statute should be given the construction contended for by the petitioner, it is to be considered whether he has brought himself within its provisions. It appears by the petition that he is a subject of a foreign state, and that he is in custody for an act which he alleges was done under right, authority, protection, or exemption claimed under the commission of a foreign state. This is not sufficient to bring the case within the statute referred to. In order to do so, it must further appear that the petitioner's domicile was in the foreign state, and that the validity and effect of the right, authority, protection or exemption claimed under the foreign commission "depend upon the law of nations." The petition contains no allegation as to the petitioner's domicile, and on that account alone is plainly insufficient under the statute. For aught that appears, the petitioner may have been a German officer domiciled in the United States. While the petition alleges that the petitioner is an officer in the German army and that he did the acts, charged as criminal, as a necessary part of an attack upon the
territory of Great Britian, with which his country is at
26 war, it nowhere states that the acts in question were authorized or commanded by the foreign state whose commission he holds, or that it has avowed responsibility therefor. In the absence of such authorization and avowal, I do not think that the prisoner can invoke the law of nations or his foreign commission in his defense. (See letter of Mr. Webster, Secretary of State, to Mr. Fox, 24 April, 1841, 26 Wendell's Reports, 682.)

It is urged that an act done by a German officer, in the United States, in furtherance of an attack upon British territory, is pre-

sumed to have been done with the authority and under the command of his government. But I do not think that this contention can be supported. A lieutenant in the German army has presumptively no authority to act for his government in a foreign country and to bind it by what he does there.

It follows that the petition does not, on this branch of the case, state facts requiring the issue of the writ.

As to the petitioner's second contention: From the allegations in the petition, it is clear that all formalities required by law in connection with the order of removal were observed. What the petition complains of is, therefore, not that there is a defect in the removal proceedings apparent upon the record, but that the judicial officers of the United States in the District of Maine, in the removal and attempted habeas corpus proceedings there, erroneously and illegally deprived him of rights to which he was entitled. It is not the business of this court to revise or correct judicial proceedings in the District of Maine. It has no power to do so. Where an order of removal is made by a judicial officer in another district having power to act in such matters, and appears upon its face to be regular, and is based upon an indictment properly returned and appearing upon its face to charge a crime within the jurisdiction of the grand jury returning it, this court ought not to undertake to go behind the order of removal, nor to examine the conduct and alleged mistakes in reference thereto of the judicial officer by whom it was made. U. S. v. Shepard, 1 Abbot's U. S. Reports, 431, 433.

Upon the facts stated in the petition, the writ of habeas corpus ought not to issue.

Petition dismissed.

27 *Petition for Appeal.*

[Filed September 27, 1915.]

Now comes the petitioner, Werner Horn, in the above entitled action, and feeling himself aggrieved by the order and decree entered by this court on June 28, 1915, in the above entitled proceeding, does hereby appeal from the said decree of the District Court, and prays that his appeal may be allowed, and that a transcript of the record of proceedings and papers on which said decree was made, duly authenticated, may be sent to the Circuit Court of Appeals for the First District of the United States.

WERNER HORN,
By his Attorneys, Jos. F., Jas. E. & D. T. O'Connell.

September 27, 1915. Appeal allowed.

JAMES M. MORTON, JR.,
U. S. District Judge.

Assignment of Errors.

[Filed September 27, 1915.]

Now comes the petitioner, Werner Horn, in the above entitled action and says that in the decree rendered therein there is manifest error in the following, among other particulars:

First. The court erred in not granting the application for the writ of habeas corpus.

Second. The court erred in not finding that the petitioner was within Section 753 of the Revised Statutes of the United States.

Third. The court erred in finding that, in the absence by the petitioner's government of any authorization and avowal, the petitioner cannot invoke the law of nations or his commission as a military officer of the German Empire in defense of his actions.

Fourth. The court erred in finding that all the formalities required by law for the removal of the petitioner from Maine to Massachusetts had been observed.

28 Fifth. The court erred in not finding that the petitioner was removed from Maine to Massachusetts without due process of law.

Sixth. The court erred in not finding that the Honorable William L. Putnam, the judge who presided at the hearing before the United States District Court for the District of Maine on March 25, 1915, in refusing to hear or consider the petition for a writ of habeas corpus, seasonably filed and presented by the petitioner, acted in violation of rights guaranteed to the petitioner by the Constitution and laws of the United States and existing treaties between the United States and the Empire of Germany and the Kingdom of Prussia.

Seventh. The court erred in not finding that the Honorable Clarence Hale, Judge of the United States District Court for the District of Maine, to whom application was seasonably made on March 25, 1915, for a hearing on the petition for a writ of habeas corpus, acted in violation of rights guaranteed to the petitioner by the Constitution and laws of the United States and existing treaties between the United States and the Empire of Germany and the Kingdom of Prussia.

Eighth. The court erred in not finding that the petitioner was denied a fair hearing before the United States Commissioner at Bangor, Maine, March 18, 1915.

Ninth. The court erred in not according the petitioner a hearing upon the actual facts, at which hearing the petitioner would have opportunity to establish whether upon the representations contained in his petition and evidence directly related thereto he would be entitled to a writ of habeas corpus or such other relief as the court after a full hearing would deem just and warranted.

Tenth. The court erred in sustaining the demurrer of the respondent to the petition for a writ of habeas corpus.

Eleventh. The court erred in finding that, when a petition for

habeas corpus verified by oath of petitioner is entered, a hearing upon the actual facts can be denied.

Twelfth. The court erred in finding that a demurrer lies to a petition for habeas corpus which represents that the petitioner has been denied rights guaranteed him by the Constitution and laws of the United States and existing treaties between the United States and the Empire of Germany and the Kingdom of Prussia.

29 Thirteenth. The court erred in finding that a demurrer lies to a petition for habeas corpus which represents that the petitioner is a subject of a foreign nation and domiciled therein, and has been denied rights guaranteed him by the Constitution and laws of the United States and existing treaties between the United States and the Empire of Germany and the Kingdom of Prussia.

Fourteenth. That the court erred in not finding that the Honorable William L. Putnam, Judge of the United States Circuit Court, who presided at the hearing of the United States District Court, held at Portland, Maine, March 25, 1915, in refusing to grant any form of hearing to the petitioner in relation to the petition for a writ of habeas corpus, and subsequently ordering the removal of the petitioner to Massachusetts, acted in violation of rights guaranteed to the petitioner by the Constitution and laws of the United States and existing treaties between the United States and the Empire of Germany and the Kingdom of Prussia.

WERNER HORN,
By His Attorneys, Jos. F., Jas. E. & D. T. O'Connell.

Bond on Appeal.

[Filed and Approved September 27, 1915.]

Know all Men by these Presents, that we, Werner Horn, commorant, as principal, and American Surety Company of New York, a corporation organized under the laws of the State of New York, having a usual place of business at Boston in the county of Suffolk and Commonwealth of Mass., as surety, are held and firmly bound unto John J. Mitchell, United States Marshal for the District of Massachusetts, in the full and just sum of two hundred and fifty dollars to be paid to the said John J. Mitchell, his certain attorney, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 27th day of September, in the year of our Lord one thousand nine hundred and fifteen.

Whereas, lately at a District Court of the United States
30 for the District of Massachusetts in a habeas corpus proceeding depending in said Court between Werner Horn and John J. Mitchell, a decree was entered against said Werner Horn, June 28, 1915, and the said Werner Horn having obtained an appeal to remove said cause to the United States Circuit Court of Appeals for the First Circuit, to reverse the decree in the aforesaid suit,

and a citation directed to the said John J. Mitchell, citing and admonishing him to be and appear in the said United States Circuit Court of Appeals for the First Circuit, in the the city of Boston, Massachusetts, on the fifth day of October, A. D. 1915.

Now, the condition of the above obligation is such, That if the said Werner Horn shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his appeal good, then the above obligation to be void; else to remain in full force and virtue.

WERNER HORN [SEAL.]
AMERICAN SURETY COMPANY
OF NEW YORK,
[SEAL.] By ELIPHALET D. PHILBRICK,
Resident Vice-President.

Attest:
PINA L. ROBERTS,
Resident Assistant Secretary.

Sealed and delivered in presence of
—— ——.

Approved:
J. M. MORTON, JR.,
U. S. District Judge.

31 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to John J. Mitchell, United States Marshal for the District of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the fifth day of October next, pursuant to an appeal duly obtained from a decree of the District Court of the United States for the District of Massachusetts, wherein Werner Horn is appellant, and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable James M. Morton, Jr., Judge of the District Court of the United States for the District of Massachusetts, this twenty-seventh day of September, in the year of our Lord one thousand nine hundred and fifteen.

JAMES M. MORTON, JR.,
U. S. District Judge.

Acceptance of Service on Citation.

SEPTEMBER 28, 1915.

Due and sufficient service of the within citation is hereby accepted.

GEORGE W. ANDERSON,
U. S. Attorney;
LEO A. ROGERS,
Assistant U. S. Attorney,
Attorneys for John J. Mitchell, U. S. Marshal.

32 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, William Nelson, Clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing is a true copy of the record in the cause entitled, No. 1254, Civil Docket, in Re Werner Horn, Petitioner for Writ of Habeas Corpus, in said District Court, determined, the Opinion of the Court dated May 11, 1915, the Petition for Appeal, the Assignment of Errors, the Bond on Appeal, and also the original Citation, issued upon the appeal of the respondent, with the Acceptance of Service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said court, at Boston, in said district, this second day of October, A. D. 1915.

[SEAL.] WILLIAM NELSON, *Clerk.*

33 & 34 United States Circuit Court of Appeals for the First Circuit, October Term, 1915.

No. 1154.

WERNER HORN, Petitioner, Appellant,
v.
JOHN J. MITCHELL, U. S. Marshal, Respondent, Appellee.

Order of Court.

February 2, 1916.

Judges Putnam and Dodge finding themselves unable to sit in this case, Judges Aldrich and Brown are assigned to sit in this case.

By the Court,

FRANCIS M. FOGARTY, *Clerk.*

35 United States Circuit Court of Appeals for the First Circuit, October Term, 1915.

No. 1154.

WERNER HORN, Petitioner, Appellant,
v.
JOHN J. MITCHELL, U. S. Marshal, Respondent, Appellee.

Appeal from the District Court of the United States for the District of Massachusetts.

Before Bingham, Aldrich, and Brown, JJ.

Opinion of the Court.

April 27, 1916.

BROWN, *J.*:

We are of the opinion that the petition of Werner Horn, the appellant, for a writ of habeas corpus was properly denied, and that it appears from the petition itself that the petitioner is not entitled to the writ.

The petition sets out the cause of detention, and the issue of the writ was unnecessary to bring that upon the record by a return to a writ.

In proceeding to consider and determine whether, upon the facts presented in the petition, the prisoner, if brought before the court, would be discharged, the learned District Judge followed an approved course, and did not in this respect deny to the petitioner any right secured to him by Section 753 of the Revised Statutes. Frank v. Mangum, 237 U. S. 309, 332; Ex parte Miligan, 4 Wall. 2, 110, 111.

The petition represents that at the February term, 1915, of the United States District Court for the District of Massachusetts, an indictment was returned by the grand jury charging that the petitioner—

36 "did unlawfully, knowingly, wilfully and feloniously transport, and carry and convey certain explosives contrary to law and in violation of the United States Statutes applicable to the transportation and conveyance of explosives."

Such statutes are set forth in Chapter 9 of the Criminal Code of the United States, which relates to offenses against foreign and interstate commerce. Sections 232 to 236, inclusive, relate to explosives.

These statutes are important regulations of commerce, designed for the protection of the lives of passengers and others, and must also be regarded as an important safeguard for the prevention of the use of instrumentalities of interstate and foreign commerce in aid of crimes which involve the use of high explosives, such as safe break-

ing, bank robberies and malicious injuries; see Ryan v. U. S., 216 Fed. 13.

As the postal service and the service of common carriers afford great facilities for the wide extension of legitimate business, so also unless safeguarded, they would afford equally great facilities for the wide extension of acts of crime, or of negligent and reckless disregard of the safety of our citizens. It is necessary, therefore, for the United States strictly to regulate the use in interstate and foreign commerce of the service of common carriers, as well as the use of its own postal service.

The penalty for a violation of the statutes concerning explosives, as defined in Section 235 of the Criminal Code, is a fine of not more than two thousand dollars, or imprisonment not more than eighteen months, or both. Under Section 335 crimes so punishable shall be deemed felonies.

We call attention to the fact that the indictment charges an offense, regarded by Congress as of such serious character as to rank as a felony, because of the contention of the petitioner that it should be considered merely as a necessary part of, or as inseparable from, or as an incident or detail of, an act of war against Great Britain, which he claims is cognizable only by the law of nations, and thus affords him immunity from punishment under a charge of violation of the laws of the United States.

37 This contention, which, so far as we are informed, is without precedent, is stated in paragraph 35 of the amended petition, as follows:—

"35. That your petitioner is an officer in the army of the Empire of Germany, to wit, a first lieutenant in the division of the aforesaid army known as the Landwehr; that a state of war exists between the Empires of Great Britain and Germany, which state of war has been recognized by the President of the United States in an official proclamation; that your petitioner is accused of destroying part of the international bridge in the township of McAdam, Province of New Brunswick and Dominion of Canada; that he is now held in custody by the respondent on the charge of carrying explosives illegally, which allegation if true is inseparably connected with the destruction of said bridge; that he is a subject and citizen of the Empire of Germany and domiciled therein and is being held in custody for the aforesaid act which was done under his right, title, authority, privilege, protection and exemption claimed under his commission as said officer as described aforesaid."

The accusation of acts done in the jurisdiction of His Britannic Majesty appears from the petition to comprise the crimes of the wilful and unlawful destruction of a railroad, in destroying a part of a bridge belonging to the railroad of the Canadian Pacific Railway Company; the unlawful obstruction of a railroad, endangering human life; placing upon said bridge and causing to be exploded an explosive substance, with intent to render and rendering said bridge dangerous, etc.

The main contention now made is that the offense charged against Horn in the indictment pending in the District Court was itself an

act of war because of its "inseparable connection" with the alleged act of war against Great Britain; and therefore cognizable only by the law of nations.

It seems unnecessary to decide whether the petition sufficiently sets forth any acts, committed in Canadian territory, which would constitute an act of war against Great Britain. Even if the allegations of the petition are assumed to be sufficient to show that the destruction of the bridge, on the Canadian side, might be regarded as an act of war against Great Britain, committed on British territory,
38 we think that it by no means follows that these allegations are sufficient to show that an act of war against Great Britain was committed within the District of Massachusetts, where the indictment was found.

It must be borne in mind that the United States statutes involved do not make illegal the transportation of explosives, but only their transportation on vessels or vehicles operated by a common carrier, and carrying passengers for hire (Sec. 232, Criminal Code), or otherwise in violation of sections 233, 234, 235. The mode of conveyance, rather than the transportation itself, is the ground of offense. A disregard of the safety of fellow passengers on trains engaged in interstate commerce, and a violation of statutory regulations of interstate commerce, constitute the gravamen of the offense, and this is not necessarily connected with the transportation of explosives, and is not war against the United States or Great Britain.

Though counsel urge that it was inseparably connected with, and a part of, the blowing up of the birdge, the petition, as we read it, nowhere admits that Horn did blow up the bridge, nor alleges that the explosives which he is charged with transporting illegally were used in blowing up the bridge. Without an allegation that an act of war was, in fact, committed by Horn, the whole theory of an "inseparable connection" amounts only to making an act done in the United States a part of something which, so far as appears, may never have been done. Certainly an act done in the United States cannot be justified as a part, or incident, or detail, of an act of war upon Great Britain which existed not in fact but only in the verbal form of an accusation. To convert the offense charged into a justifiable act of war upon the theory of inseparable connection, we first must have facts to connect; therefore to pursue the appellant's argument we must assume that Horn did blow up the bridge before proceeding to examine further the question whether there is a connection, and if so, whether it is an inseparable connection, between this and his alleged disregard of the laws of the United States.

The connection between the use of prohibited means of transportation and the subsequent use of the explosive to destroy
39 a bridge is remote. The act of war, if we may call it such, can be completely described without any reference to the mode in which the explosive was conveyed to the scene of its use. Whether the explosive was transported lawfully or unlawfully has no casual connection with its use or its effectiveness to destroy a bridge.

Likewise the offense against the United States may be fully de-

scribed without any reference to the use of the explosive after transportation.

The connection so far from being "inseparable" is wholly artificial for the purpose of invoking a single ground of exemption for two separate acts.

A conviction under this indictment would not involve punishment for any act done in British territory. Neither an intent to use nor the use of the explosive on British territory, subsequent to its transportation in violation of the statutes of the United States, could form any part of the offense charged in the indictment, under which the guilty intent is the intent to carry, irrespective of any intent to use.

So, also, a conviction under the charges of acts done upon British territory would not involve punishment for the transportation of the explosive within the territory of the United States, nor would that constitute any part of the offense.

The two offenses charged, therefore, are clearly distinct and separate, for they do not involve the same acts, nor parts of the same act; but each is complete in itself without involving as a part or element any act or intent essential to the other. They differ completely in time and place and in the acts charged. Both in fact and in law the transactions are substantially different and separate.

In our opinion the allegations that the acts done in the United States are "necessarily connected" with, or inseparable from, the act of blowing up the bridge have no weight, but state merely an erroneous conclusion of law. This, we think, is a vital error underlying the whole contention of the appellant. The theory that what Horn did in the United States was a mere detail or incident of an act of war done in British territory by Germany against Great Britain would lead to the conclusion that neither Horn nor his government is responsible to the United States.

40 The principle of international law which is invoked for Horn's protection is thus stated:

"That an individual forming part of a public force, and acting under the authority of his government, is not to be held answerable as a private trespasser or malefactor, is a principle of public law sanctioned by the usages of all civilized nations, and which the Government of the United States has no inclination to dispute." (See 26 Wendell *683, quoting instructions of Webster, Secretary of State, to the Attorney-General.)

But this exemption of the individual is on the ground that his act was a national act of his sovereign, and thus to be dealth with between nations under the law of nations.

Upon what theory, then, is this act of Horn's in the United States to be held a national act of his sovereign? There is no allegation that what he did in the United States or in Canada was specifically authorized or avowed by the appellant's government. He relies upon a commission as a first lieutenant of the Landwehr (second reserve) Pioneers, which is dated August 18, 1908; but this is insufficient to show that he had been called to active service, or had become a part of an armed force. Surely his government, upon the mere ground

that it has issued such a commission, cannot, as a nation, be presumed to have authorized his acts either here or in Canada.

It is urged that implied authority is sufficient; but the holding of a commission of this kind is no basis for an implication either of authorty in Horn or of responsibility of his government.

As the only authority asserted by Horn is under his commission, which, in our opinion, is no evidence of authority to do any acts as a belligerent within the United States, we find no ground for extending to him any of the privileges or exemptions which might result from a finding that his act was a national act. Due respect to his government would forbid us from imputing to it a national responsibility to the United States upon such facts as are set forth in the petition.

The appellant cites the well-known case of People v. McLeod, 25 Wendell, 482, and the commentaries upon that case in 26 Wendell, 663, et seq.; but these have little bearing on the present case. See also Wharton's International Law Digest, Vol. 1, Sec. 21.

41 & 42

No principle of international law that was recognized by the United States in the correspondence with Great Britain over the attack upon the schooner "'Caroline" is applicable to this case.

The fact that Horn holds such a commission as he relies upon, in our opinion, is insufficient to show authorization of an attack upon Great Britain in Canada; but even if such authority to attack a public enemy follows from such a commission, it affords no implication of authority for a violation of the laws of a neutral nation in a matter having so remote a relation to the proximate act of exploding an explosive substance in hostile territory.

The petition, in our opinion, fails entirely to show either express or implied national authority for doing the acts charged in the indictment; therefore no question of international law is involved, and the District Court has full jurisdiction to proceed to trial of the indictment found by its grand jury.

We agree with the contention of the United States Attorney that if the present petition cannot be maintained on its merits it is immaterial whether an earlier petition to the same unmeritorious effect was or was not erroneously refused consideration. Our conclusion that the grounds upon which the appellant seeks a discharge are unsound cuts under all other questions raised. He fails to show that the acts for which he is indicted were done under compulsion or command of his sovereign. There is no question of punishing him for anything done in Canada; there is no question of double punishment for the same act. No defense which he may have against punishment for violation of the laws of another nation, or against extradition upon a charge of such offense, is taken away from him by a refusal of the writ of habeas corpus.

The petition contains many matters which, upon this appeal, we have no power to review. We may say, however, that, in our opinion the grounds upon which he contested the jurisdiction of the commissioner were without substantial merit; and that he has had a full

hearing upon the merits of his clam to immunity from trial upon the indictment.

The judgment of the District Court is affirmed.

43 & 44 United States Circuit Court of Appeals for the First Circuit, October Term, 1915.

No. 1154.

WERNER HORN, Petitioner, Appellant,
v.
JOHN J. MITCHELL, U. S. Marshal, Respondent, Appellee.

Fincl Decree.

April 27, 1916.

This cause came on to heard February 2, 1916, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

On consideration whereof, it is now, to wit, April 27, 1916, here ordered, adjudged and decreed as follows: The Judgment of the District Court is affirmed.

By the Court,

FRANCIS M. FOGARTY, *Clerk.*

45 & 46 *Petition for Appeal to the Supreme Court of the United States from the Circuit Court of Appeals for the First Circuit.*

(Filed September 13, 1916.)

To the Honorable the Judges of the Circuit Court of Appeals for the First Circuit:

The above mentioned Werner Horn, appellant, respectfully represents that the above entitled cause is now pending in the United States Circuit Court of Appeals for the First Circuit and that decree therein was rendered and filed on the 27th day of April, 1916, affirming the decree of the District Court of the United States for the District of Massachusetts; that the appellant believes himself aggrieved by the aforesaid decree; that this cause is one in which the decree of the Circuit Court of Appeals is not final and is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore the said Werner Horn doth hereby appeal from the aforesaid decree of the United States Circuit Court of Appeals for the First Circuit, for the reasons specified in the assignment of errors which he has filed herewith, and prays that this appeal may be allowed and that the Clerk of the aforesaid Circuit Court be directed to send a duly authenticated transcript of the record, proceedings and

papers concerning the said cause to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed may be reviewed, and if error be found, corrected according to the laws of the United States and existing treaties between the United States and the Empire of Germany and the Kingdom of Prussia.

WERNER HORN,
By His Attorneys, JOS. F., JAS. E. & DAN'L T. O'CONNELL.

47 & 48 *Assignment of Errors Filed by the Appellant in Connection with His Petition for Appeal to the Supreme Court of the United States from the Circuit Court of Appeals for the First Circuit.*

(Filed September 13, 1916.)

And now on this 8th day of September, 1916, comes the petitioner Werner Horn (Appellant) and says that the decree entered in the above entitled case on the 27th day of April, 1916, is erroneous and unjust to him because the Court erred:

1st. In affirming the decree of the District Court.

2nd. In not ruling that the application for the writ of habeas corpus should have been granted by the District Court.

3rd. In not ruling that the petitioner was removed from Maine to Massachusetts without due process of law.

4th. In not ruling that Judge William L. Putnam, who presided at the hearing before the United States District Court for the District of Maine on March 25, 1915, in refusing to hear or consider the petition for a writ of habeas corpus, seasonably filed and presented by the petitioner, acted in violation of rights guaranteed to the petitioner by the Constitution and Laws of the United States and existing treaties between the United States and the Empire of Germany and the Kingdom of Prussia.

5th. In not ruling that the refusal of Judge William L. Putnam to permit to be filed, to read or hear read, or to give any consideration whatsoever to, a petition for the issuance of a writ of habeas corpus, when seasonably presented, denied the privileges and right of the writ of habeas corpus guaranteed by the Constitution and laws of the United States, and was in itself a violation of the rights of the petitioner guaranteed by the Constitution and laws of the United States thereby entitling the petitioner to be heard on the petition presented to the Massachusetts District Court, for the purpose of determining whether or not an order should issue for his return to the District of Maine, therefore a cause for the issuance of the writ by the Massachusetts Court was stated, and the sustaining of the respondent's demurrer, denying the petitioner a hearing on his petition, was erroneous.

6th. In not ruling that the refusal of Judge Clarence Hale to read or hear read, or to give any consideration whatsoever to, a
49 & 50 petition for the issuance of a writ of habeas corpus, when seasonably presented, denied the privilege and right of the

writ of habeas corpus guaranteed by the Constitution and laws of the United States, and was in itself a violation of the rights of the petitioner guaranteed by the Constitution and laws of the United States, thereby entitling the petitioner to be heard on the petition presented to the Massachusetts District Court, for the purpose of determining whether or not an order should issue for his return to the District of Maine, therefore a cause for the issuance of the writ by the Massachusetts Court was stated, and the sustaining of the respondent's demurrer, denying the petitioner a hearing on his petition, was erroneous.

7th. In not ruling specifically whether or not a petition for habeas corpus seasonably presented can be refused entry in Court by order of a Judge of a United States Court.

8th. In not ruling specifically whether or not a petition for habeas corpus seasonably presented can be refused any consideration whatsoever by a United States Judge or Judges.

9th. In not ruling specifically whether or not Morton J., was in error in finding as follows:

"From the allegations in the petition, it is clear that all formalities required by law in connection with the order of removal were observed."

10th. In not ruling that Morton J., was in error in not according the petitioner a hearing upon the actual facts, at which hearing the petitioner would have opportunity to establish whether upon the representations contained in his petition and evidence directly related thereto he would be entitled to a writ of habeas corpus or such other relief as the Court after a full hearing would deem just and warranted.

11th. In not ruling that the petitioner was within Section 753 of the Revised Laws of the United States, viz.,

"The writ of habeas corpus shall in no case extend to a prisoner in jail, unless * * * being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

12th. In not ruling that even in the absence of authorization and avowal by the petitioner's government, the petitioner
51 & 52 can invoke the law of nations or his commission as a military office- of the German Empire in defense of his actions.

13th. In not ruling that the petitioner was denied a fair hearing before the United States Commissioner at Bangor, Maine, March 18, 1915.

WERNER HORN,
By His Attorneys, Jos. F., Jas. E. &
Dan'l T. O'Connell.

53 & 54 United States Circuit Court of Appeals, for the First Circuit. October Term, 1915.

No. 1154.

WERNER HORN, Petitioner, Appellant,
v.
JOHN J. MITCHELL, U. S. Marshal, Respondent, Appellee.

Order of Court.

September 13, 1916.

Bingham & Aldrich, JJ. Upon the filing of the appellant's petition for appeal to the Supreme Court of the United States, it is ordered that citation, signed by the presiding judge, Hon. George H. Bingham, issue when an appeal bond in the sum of $250, with sureties approved by the clerk, has been filed by the appellant.

By the Court,

ARTHUR I. CHARRON, *Clerk.*

55 & 56 *Bond on Appeal.*

(Filed September 15, 1916.)

Know all men by these presents, that we, Werner Horn, cormorant, as principal, and American Surety Company of New York, a corporation organized under the laws of the State of New York having a usual place of business at Boston in the County of Suffolk and the Commonwealth of Massachusetts, as Surety, are held and firmly bound unto John J. Mitchell, United States Marshal for the District of Massachusetts, in the full and just sum of Two Hundred and Fifty Dollars ($250.00) to be paid to the said John J. Mitchell, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this fourteenth day of September in the year of our Lord one thousand nine hundred and sixteen.

Whereas, lately at a District Court of the United States for the District of Massachuetts in a habeas corpus proceeding depending in said Court between Werner Horn and John J. Mitchell, a decree was entered against the said Werner Horn, June 28, 1915, and the said Werner Horn having obtained an appeal to remove said cause to the United States Circuit Court of Appeals for the First District, to reverse the decree in the aforesaid suit, and a citation directed to the said John J. Mitchell, citing and adminishing him to be and appear in the said United States Circuit Court of Appeals for the First District, in the City of Boston, Massachusetts, on the fifth day of October, A. D. 1915.

Whereas, lately at a sitting of the United States Circuit Court of Appeals for the First Circuit, a decree was entered under date of April 27, 1916, affirming the aforesaid decree of the District Court of the United States for the District of Massachusetts, the said Werner Horn having obtained an appeal to remove said cause to the United States Supreme Court to reverse the decrees of the aforesaid suit, and a citation directed to the said John J. Mitchell, citing and admonishing him to be and appear in the said United States Supreme Court at Washington in the District of Columbia, on the 14th day of October, A. D. 1916.

Now, the condition of the above obligation is such that if the said Werner Horn shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his appeal good, then the above obligation to be void; else to remain in full force and virtue.

57 & 58

WERNER HORN, [SEAL.]
AMERICAN SURETY COMPANY
OF NEW YORK,
By FRED L. ROBERTS,
Resident Vice President.

Attest:
THOMAS J. GARGAN, [CORPORATE SEAL.]
Resident Assistant Secretary.

Sealed and delivered in presence of
ERNEST B. ROWE.

Approved as to surety:
ARTHUR I. CHARRON, *Clerk.*

59 UNITED STATES OF AMERICA, *ss:*

Citation on Appeal.

The President of the United States to John J. Mitchell, United States Marshal for the District of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, on the *fourteenth day of October next, pursuant to an Appeal duly obtained from a decree of the †United States Circuit Court of Appeals for the First Circuit, wherein Werner Horn is appellant and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George H. Bingham, a Judge of the United States Circuit Court of Appeals for the First Circuit, this fifteenth day of September, in the year of our Lord one thousand nine hundred and sixteen.

GEORGE H. BINGHAM,
Circuit Judge.

* Not exceeding 30 days from the day of signing.
† Name of Court in which the Decree is entered.

60 Due and sufficient service is acknowledged Sept. 15, 1916.

JOHN J. MITCHELL,
U. S. Marshal.

61 United States Circuit Court of Appeals for the First Circuit, October Term, 1915.

No. 1154.

WERNER HORN, Petitioner, Appellant,
v.
JOHN J. MITCHELL, U. S. Marshal, Respondent, Appellee.

Clerk's Certificate.

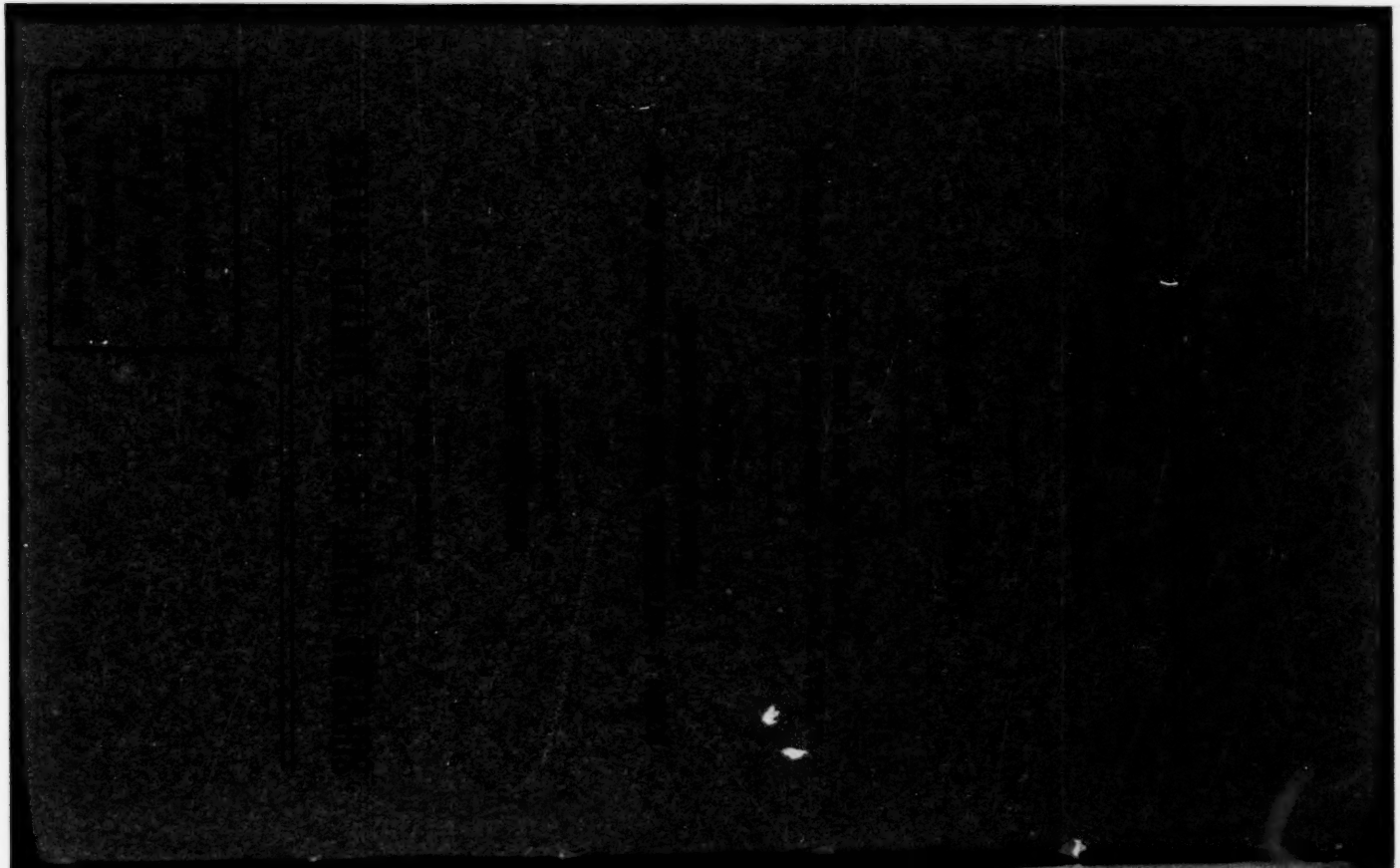
I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the foregoing is a true copy of the record and all proceedings of said Circuit Court of Appeals in the cause entitled, No. 1154. Werner Horn, Petitioner, Appellant, v. John J. Mitchell, U. S. Marshal, Respondent, Appellee, in said Circuit Court of Appeals determined, the Petition for Appeal, the Assignment of Errors, the Bond on Appeal and also the original Citation issued upon the Appeal of Werner Horn, Petitioner, Appellant, in said cause with acknowledgment of service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this twenty-second day of September, A. D. 1916.

[Seal United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON, *Clerk.*

Endorsed on cover: File No. 25,509. U. S. Circuit Court Appeals, 1st Circuit. Term No. 679. Werner Horn, appellant, vs. John J. Mitchell, United States Marshal for the District of Massachusetts. Filed September 27th, 1916. File No. 25,509.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 679

WERNER HORN, APPELLANT,

v.

JOHN J. MITCHELL, UNITED STATES MARSHAL FOR THE DISTRICT OF MASSACHUSETTS, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

MOTION TO ADVANCE.

Now comes Werner Horn, appellant, and respectfully shows that on the thirteenth day of September, 1916, an appeal was duly allowed to this Court, in the above-entitled cause, from an order of the United States Circuit Court of Appeals for the First Circuit, issued April 27, 1916, affirming the judgment of the United States Court for the District of Massachusetts, dismissing the appellant's petition for the issuance of a writ of habeas corpus; the aforesaid petition represented that the appellant was wrongfully held in the custody of the appellee under color of an order of commitment issued March 25, 1915, by the United States District Court for the District of Massachusetts, to answer to indictments returned by the aforesaid District Court, charging the appellant did knowingly, wilfully and feloniously transport, carry and convey certain

explosives contrary to law and in violation of the United States statutes applicable to the transportation and conveyance of explosives.

That the appellant is a military officer in the Imperial Army of the Empire of Germany, holding the commission of a first lieutenant; that on February 2, 1915, the International Bridge connecting the Town of Vanceboro, State of Maine, with the Parish of McAdam, Province of New Brunswick and Dominion of Canada, was partially destroyed by an explosion, all damage thereto being confined to the parts of the bridge located on Canadian soil; that on February 20, 1915, the Honorable Clarence Hale, United States Judge for the District of Maine, issued a warrant for the arrest of the appellant, based upon a petition filed by properly accredited officials of the Canadian Government asking for the extradition to Canada of the appellant, it being charged that the destruction of the aforesaid International Bridge at Vanceboro was the act of the appellant; the warrant issued by Hale, J., has never been served; a second warrant of similar character has been issued by the United States District Court for the District of Massachusetts, which warrant also has not been served.

That subsequent to the arrest of the appellant on or about March 7, 1915, within the Maine jurisdiction, to answer to the Massachusetts indictments, the appellant at Portland, Maine, seasonably and duly presented a petition for the issuance of the writ of habeas corpus; that Honorable William L. Putnam, a Judge of the United States Circuit Court, directed the Clerk of the United States Court for the District of Maine not to permit the petition to be filed; the aforesaid Putnam, J., also refused to allow the petition to be presented to him prior to the convening of court, and when the court had convened refused to allow the petition to be read, to read it himself or to give it any consideration whatsoever; that, in violation of the rights

of the appellant, the aforesaid Putnam, J., ordered the appellant removed to Massachusetts; that prior to actual removal the aforesaid Hale, J., refused to read or give any consideration to a habeas corpus petition seasonably presented to him which recited the act of Putnam, J., in refusing to give any consideration to the petition as first presented. Removal of the appellant to Massachusetts was then effected, as against protest by the appellant, by force of the order of removal issued by Putnam, J.

That the appellant, in the habeas corpus petitions presented respectively to Putnam and Hale, JJ., had represented that the attempted destruction of the International Bridge was an act of war committed on the soil of a country with which his country was at war, that the alleged offence for which he was indicted by the Massachusetts District Court constituted an act of war being inseparably connected with the aforesaid act of war committed on British territory, wherefore the appellant was amenable only to the law of nations; that he was being held in custody in violation of existing treaties between the United States and Germany and the Constitution and laws of the United States.

That the appellant in the habeas corpus petition presented to the Massachusetts District Court represented that his removal from Maine to Massachusetts was in violation of the Constitution and laws of the United States, and existing treaties between the United States and Germany pertaining to acts of war, and the laws of the United States and provisions of the Constitution safeguarding the right to be heard on petition for the issuance of the writ of habeas corpus. The appellant specifically invoked the rights guaranteed him by Section 753 of the Revised Statutes, which reads as follows:—

" The writ of habeas corpus shall in no case extend

to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some Court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law of treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

The appellee filed a demurrer which was sustained by Morton, J., of the District Court for Massachusetts, who on May 11, 1915, ordered the petition dismissed. The finding of Morton, J., of the District Court was affirmed on appeal, by the United States Circuit Court of Appeals as heretofore stated. The assignment of errors on the part of the latter named court has been filed, and the cause has been duly docketed.

The motion to advance this cause for a speedy hearing is made for the reason that the appellant has been in custody since on or about March 6, 1915. The continued imprisonment is believed by the appellant to have already impaired his health, which impairment may increase if his imprisonment is continued until such time as the cause would be reached for consideration in its regular course. The cause involves two main questions, viz., (1) whether the appellant was entitled to be heard on his petitions for habeas corpus by Putnam and Hale, JJ., of

the Maine jurisdiction and by Morton, J., of the Massachusetts jurisdiction; and (2) is the alleged offence for which the appellant is held in custody an act of war controlled by the law of nations and not by the municipal law of the United States. The appellant urges that these questions should be decided at the earliest date possible to the end that he may be accorded his discharge from custody, or if he must stand trial upon the indictments of the Massachusetts District Court that the trial may proceed. The appellant is willing to have this cause set for hearing on any day and is desirous that the earliest practicable day be fixed for hearing of said appeal.

Wherefore, the appellant prays that this cause be advanced and set for argument on such day as this Honorable Court may deem proper.

Notice of this motion has been served on the Attorney General of the United States.

JOSEPH F. O'CONNELL,
Attorney for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 679.

WERNER HORN, APPELLANT,

v.

JOHN J. MITCHELL, UNITED STATES MARSHAL FOR THE DISTRICT OF MASSACHUSETTS, APPELLEE.

SUPPLEMENTARY BRIEF OF APPELLANT, WERNER HORN.

THE COURT HAS JURISDICTION TO HEAR AND DETERMINE APPEAL.

The judgment of the Circuit Court of Appeals was not final as argued by the appellee in his brief. This Court clearly has jurisdiction to hear and determine the appeal.

Foster, Federal Practice, 5th (last) Edition, Section 467, at page 1520, in discussing the right of appeal from the Circuit Court of Appeals to the Supreme Court, says: —

> "In the latter case (referring to that class of cases in Section 763, Revised Statutes, concerning an officer of a foreign nation such as is in this case), the Supreme Court may have jurisdiction to review the decision of the Circuit Court of Appeals upon an appeal from an order of district judge as well as from an order of a district judge."

Judicial Code, Section 238, provides for cases which appeal directly from the District Court to the Supreme Court.

No provision is made in this section literally or by implication for such direct appeal where a petition for habeas corpus on the ground alleged in Revised Statutes, Section 763, Clause 2, is denied in the District Court.

It might appear that such an appeal can only be taken to the Circuit Court of Appeals under Judicial Code, Section 128, inasmuch as it is not a case included in Section 238, if we consider only these sections, but further investigation leads to a different conclusion.

DID CONGRESS INTEND TO DEPRIVE SUCH AN IMPORTANT QUESTION OF THE ABSOLUTE RIGHT TO APPEAL TO THE SUPREME COURT.

By Revised Statutes, Section 763, Clause 2, and Section 764, which were originally enacted in 1842, an absolute right to appeal to the Supreme Court was given to a prisoner, the subject of a foreign state, held in custody for an act done under an alleged right, title and exemption as a foreign citizen. No subsequent legislation has ever been attempted on this question either directly or by implication.

This was for many years the only class of case of habeas corpus in which such a right to appeal to the Supreme Court existed, and only in 1885 was the law enlarged to include the first clause of said section relating to the other important subjects, viz., constitutional and treaty questions.

It seems unnecessary to argue that Congress thus recognized the paramount importance of the rights of a foreign prisoner seeking habeas corpus above all other classes of cases entitled to habeas relief by so granting to him an absolute right of appeal to the Supreme Court.

By a casual construction of the Act of March 3, 1891, and the Judicial Code, such a right of appeal would seem to be taken away since Section 238 does not include this class within its provisions as having a right to appeal to the Supreme Court and no right to appeal appears elsewhere in the Judicial Code. But considering the importance which Congress previously attached to this class such a conclusion seems incredible, if not absurd; and, therefore, open to serious doubt of such being the intention of Congress.

Section 128 of the Judicial Code provides for cases within the final jurisdiction of the Circuit Court of Appeals subject to certain exceptions, but there is nothing in the language of this section which prohibits an appeal in cases not within its final jurisdiction such as the class under Revised Statutes, Section 763, Clause 2.

The Court of Appeals, Act of 1891, and the Judicial Code of 1911 do not specifically repeal the habeas corpus provisions as found in Revised Statutes, Sections 763 to 765. And while acts and parts of acts in the Revised Statutes relating to appeals and inconsistent with the Acts of 1891 and 1911 are repealed, it follows that Section 764 is not repealed because it is not inconsistent with the subsequent acts referred to.

No specific mention is made of Section 763, Clause 2, or of the language it adopts, and only by implication can it be said it is repealed; such a conclusion must rest upon the intention of Congress as gathered from a clear understanding of the entire legislative scheme.

Bearing in mind the importance attached to Section 763, Clause 2, which from 1842 extends the right of appeal by Section 764, a purpose to destroy the right is not manifest when a companion class, viz., Constitutional questions, have such a right preserved in the Code Section 238, as well as being accorded to minor cases not previously

entitled to it. This Section 238 seems an effort to enlarge the field of cases rather than to limit it. The same is true of Section 241. Such a radical change would have been manifested by some direct reference to Section 763, Clause 2. This latter provision not being specifically repealed, a construction should be given these provisions which would harmonize all.

Revised Statutes, Section 763, Clause 2, and Section 764 have been and still are special provisions relating to habeas corpus and for this reason were not included in Section 238 Judicial Code. They were not intentionally omitted to thereby confer a sole jurisdiction on a court of lesser jurisdiction than the Supreme Court, because such a conclusion is arrived at only by implication and is in conflict with a long established opposite policy. Being special provisions they should not be construed as repealed by general provisions unless the intent to do so is clearly manifested or unless their continued existence is repugnant to the purpose of the general provisions.

NOT LEGISLATIVE INTENT TO REPEAL SECTION 763, CLAUSE 2, AND SECTION 764.

In view of the long established policy in relation to this class, the failure to include it specifically in the Act of 1891, or Section 238 of the Judicial Code, together with the revolutionary effect upon this established policy if excluded from Section 238 or 241 by thus being relegated to Section 128, and the inclusion in Section 238 of cases of comparatively minor importance, all emphasize the conclusion that it was not the legislative purpose to repeal Revised Statutes 763, Clause 2, and Section 764 providing the right of appeal, but rather, in view of their international importance, to keep them unrepealed.

"Repeals by implication are not favored. This means that it is the duty of the Court to so construe

the acts, if possible, that both shall be operative. 'When some office or function can by fair construction be assigned to both acts, and they confer different powers to be exercised for different purposes, both must stand, though they were designed to operate upon the same general subject.'"

See Lewis' Sutherland Statutory Construction, Vol. I, Second Edition.

The Revised Statutes, Section 764, provides an appeal from the Circuit Court; at the time of the Act of 1891 this Court was an Appellate Court, which was superseded in its powers by the Circuit Court of Appeals and then the Circuit Court itself was later abolished. The right to appeal to the Supreme Court on the subject-matter is the question really involved; the petitioner upon this question can only avail himself of that right through the Circuit Court of Appeals because the law has placed him there. The right of appeal to the Supreme Court is still preserved for conditions under Clause 2 of Section 763, no matter what Court it comes from, until that section is expressly repealed.

ONLY THE SUBSTITUTE ACT OF MARCH 3, 1885, WAS REPEALED IN THE ACT OF MARCH 3, 1891, NOT SECTION 764, REVISED STATUTES.

In the supplement to Revised Statutes, U. S., Vol. I, 2d Edition, wherein the act of March 3, 1891, is found, there is a note to the title of said Act on page 901, which enumerates the acts relating to the jurisdiction of the Supreme Court which are defined and regulated. But Section 764 does not appear.

It does, however, name Act of March 3, 1885, which was an amendment to said Section 764.

This in itself is extremely important in sustaining the

contention of the appellant that Congress never intended to deprive a foreign citizen or officer the unquestioned right of appeal to the Supreme Court.

What did Congress mean by repealing the amendment and not mentioning the original Section 764, Revised Statutes, if it did not intend to say that it was leaving this very important act absolutely alone, and was not considering it in the new legislation of the Judicial Code.

Further, in the second last clause of Section 297, Judicial Code, Congress explained its purpose when it enacted the following: "Also all other acts and parts of acts, insofar as they are embraced within and superseded by this act, are hereby repealed; the remaining portions thereof to be and remain in force with the same effect and to the same extent as if this act had not been passed."

Surely there is nothing in the Judicial Code to indicate that Section 764 as it originally was enacted is herein embraced.

Only by the most tortured implication can Section 764 as it relates to Clause 2 of Section 763, Revised Laws, be considered as being embraced in this act.

Habeas corpus is a writ of highest privilege and when considered in connection with Clause 2 of Section 763, which announces the adoption by our Congress of a well-established rule of the law of nations, its repeal should be enacted only in the clearest and most certain language.

In fact, we believe that Section 764, as far as it relates to the last clause of Section 763, is expressly revived and re-enacted by the concluding part of Section 297, Judicial Code, which states: "the remaining portions of unrepealed acts to be and remain in force with the same effect and to the same extent as if this act had not been passed".

> "The weakest form of repealer is that in common use in a number of states. 'All acts and parts of

acts inconsistent with the provisions of this act are hereby repealed.' The use of such a repealer rests largely on custom. It is doubtful whether such statements add anything to the law above what the courts would hold to be the standard if no repealing clause were inserted."

See Jones, Statute Law Making, p. 150, and cases therein cited.

THERE IS NO PRIOR CASE DEALING WITH QUESTION WHETHER PETITIONER, WHO INVOKING THE LAW OF NATIONS FIRST GOES TO CIRCUIT COURT OF APPEALS INSTEAD OF SUPREME COURT, IS BARRED FROM APPEAL TO LATTER COURT.

This Court has not in any case heretofore submitted to it passed upon the question whether a petitioner for the habeas corpus writ who by the provisions of Section 238 of the Judicial Code was entitled as of right to take his appeal direct to the Supreme Court, in lieu of that course appealed to the Circuit Court of Appeals, is thereby barred from appeal from the latter court to the Supreme Court.

The line of cases cited by the appellee to sustain his position that appeal from the Circuit Court lies only in cases wherein there is a money value as provided by Section 241, do not approach or refer to the point. The appellee cites the following:—

Cross v. *Burke,* 146 U.S. 88;
Fisher v. *Baker,* 203 U.S. 181;
Lau Ow Bew v. *U. S.,* 144 U.S. 58;
Whitney v. *Dick,* 202 U.S. 135;
Healey v. *Backus,* 241 U.S. 655.

All of the foregoing are built around other provisions of the Judicial Code, and plainly fall within the provisions of Section 128.

Fisher v. *Baker,* 203 U.S. p. 183, Chief Justice Fuller, concluding his opinion, says:—

> "It was no purpose of the Act of 1891 to change the form of remedies theretofore pursued. *In re Lennon,* 150 U.S. 393; *Ekiu* v. *U. S.,* 142 U.S. 651; *Gonzales* v. *Cunningham,* 164 U.S. 612."

This Court by the foregoing expression sought to make clear that the old Section 763 of the Revised Statutes was retained with full effect, and was not affected by any repealing clauses. See Section 294, Judicial Code.

The appellee seeks to establish that if the judgment of the Circuit Court of Appeals was not final, an appeal was subject to the provisions of Section 241 of the Judicial Code, which provides that the sum of money must exceed one thousand dollars. There was no money value involved in the Lennon case (*supra*) or the cases cited therein.

To support the proposition that a right of appeal is open only in those cases where the matter in controversy shall exceed one thousand dollars, the appellee must rely on the last clause of Section 6 of the Act of 1891 so far as the same was drafted into the Judicial Code and became Section 241 of the Code. The said clause of Section 6 of the Act 1891 is as follows:—

> "In all cases not hereinbefore, *in this section,* made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs."

Congress, in the Judicial Code, provided for the manner in which the various changes should be construed. Section 294 reads:—

> "The provisions of this Act, so far as they are sub-

> stantially the same as existing statutes, shall be construed as continuations thereof, and not as new enactments, and there shall be no implication of a change of intent by reason of a change of words in such statute, unless such change of intent shall be clearly manifest."

It is essential, for a close analysis of the intent of the Congress in drafting the provision, to bear in mind that the words "*in this section*" are controlling. The words are simple, plain and clear in the use to which they are put. They restrict the provision pertaining to money value to the classes of actions described in Section 6. So it is obvious that the clause referring to money value relied upon by the appellee in his brief is not applicable, and in respect to the jurisdiction of this Court to entertain the appellant's appeal has no force or effect.

ATTITUDE OF THIS COURT.—CONSIDERING THIS MATTER OF JURISDICTION.

This Court has clearly indicated that it will take jurisdiction on appeal from the Circuit Court of Appeals whenever the cases present questions for its consideration involving the construction or application of the Constitution of the United States.

In re Norton v. *Whiteside*, 239 U. S. 143 at 155, which was an appeal from a decree of the Circuit Court of Appeals affirming a decree of a Circuit Court, this Court dismissed the appeal, but plainly and unequivocally said that if it had involved the question of diverse citizenship as set forth in Section 238 this Court would have been justified in reviewing the action of the Circuit Court of Appeals.

> "As from what we have said it results that our opinion is that there is no substantial ground for concluding that the jurisdiction of the District Court

rested upon any assertion of Federal right irrespective of diverse citizenship justifying our review of the Court below it follows that the appeal must be dismissed for want of jurisdiction."

Again in *Roman Catholic Church* v. *Penn. R. R. Co.*, 227 U. S. 575 at 577, which is an appeal from the Circuit Court of Appeals affirming decree of Circuit Court, this Court, in an opinion delivered by Chief Justice White, says: —

". . . . Whether we have jurisdiction depends upon whether the jurisdiction of the Circuit Court was by the pleading invoked not alone because of diverse citizenship, but also because rights under the Constitution and laws of the United States were expressly asserted in the pleadings as a basis for jurisdiction. In other words the inquiry is whether if the averments in the complaint were disregarded, there would yet remain in the complaint such averments as to the existence of rights under the Constitution and laws of the United States as would be adequate to sustain jurisdiction."

And in *Christianson* v. *King County*, 239 U. S. 356 at 361, being an appeal from the Circuit Court of Appeals, affirming action of District Court in sustaining a demurrer dismissing the complaint, the court denied a motion to dismiss inasmuch as it appeared from the amended bill that the controversy involved with other questions the construction of an Act of Congress.

In re Lennon, 150 U. S. 393 at 401, Chief Justice Fuller practically said that where the question of due process of law was invoked this Court unquestionably had jurisdiction, when he says at page 400: —

"Nor can the attempt be successfully made to bring

the case within the class of cases in which the construction or application of the Constitution is involved in the sense of the Statute, and the contention that the petitioner *was deprived of his liberty without due process of law.*"

RIGHT TO APPEAL CASE OF THIS KIND FUNDAMENTAL.

The due process of law provisions of the United States Constitution, fortified with laws of the United States, and the directly related connection with treaty rights, would make unconstitutional any act of Congress shutting off an appeal to the highest tribunal of the land in cases involving the construction or application of the Constitution and of treaties of the United States. Congress by Section 238 of the Judicial Code and by the Act of March 3, 1891, avoided that possible conflict and limited the cases wherein action by the Circuit Court of Appeals was to be final to those wherein the questions referred to were not at issue.

The right of petition for the writ of habeas corpus is of course the most important privilege guaranteed under our Constitution. If Congress intended to define or limit the method by which the rights granted in habeas corpus could be secured, it should do so in most explicit terms. There should be no ambiguity about the words used, and certainly no such fundamental rights should be taken away by implication. We believe that Congress did not even contemplate curtailing the right to be heard by the United States Supreme Court on this question and until Congress does so declare in so many plain words susceptible to no doubt or questionable construction, this petitioner cannot be denied the right to be heard in this the highest tribunal which was designated when the law under which he seeks redress was itself enacted.

COMMONWEALTH v. BLODGETT (MASS.) ESTABLISHES PRINCIPLE THAT LAW OF NATIONS IS CONTROLLING.

The appellee cites *Commonwealth* v. *Blodgett*, 12 Metcalf (Mass.), page 56, in his brief on page 15, and the appellant respectfully calls attention to the facts in that case: As stated in said case at page 68, it is to be observed that before the Commonwealth of Massachusetts proceeded to act against Blodgett, it sent its Adjutant General to Rhode Island to ascertain whether the conduct of Blodgett was authorized or countenanced by the authorities of that State, whereupon the Executive of Rhode Island disclaimed and repudiated the act; in other words, the Commonwealth of Massachusetts had indicated by its official conduct in the Blodgett case the principle for which the appellant contends in this case, viz., that it is a matter for the State or War Department to ascertain whether or not the government of the appellant authorizes or disclaims his action before proceeding to prosecute him for a violation of our municipal laws after he asserts that his action was done under his authority as an officer. The court said in the same case of *Commonwealth* v. *Blodgett*, 12 Metcalf, at page 84, commenting on whether the act was punishable if the State of Rhode Island had authorized it:—

> "The wrong done by such an invasion then becomes a question of negotiation between sovereigns, and the subordinate agents are entitled to immunity."

Respectfully submitted,

JOSEPH F. O'CONNELL,
JAMES E. O'CONNELL,
DANIEL T. O'CONNELL,
Counsel for Appellant.

TABLE OF CONTENTS.

	Page
Statement of the Case	1
History of Act	2
Hearing Before U. S. Commissioner at Bangor, Me.	3
Exclusion of Evidence	4
Fair Hearing Denied	5
Refusal by Putnam, J., to Allow Petition for Habeas Corpus to be Filed	6
Putnam, J , Refused to Consider Habeas Corpus Petition,	6
Petitioner Not Allowed to State Contents of Petition	7
Refusal by Hale, J , to Entertain Petition for Habeas Corpus	8
Petition for Habeas Corpus Submitted to Morton, Jr , in Massachusetts	9
Argument	11
Denial of Fundamental Rights	12
"Cut Under" Process	13
Petition within Section 753 U. S. Revised Statutes	14
Habeas Corpus Rights Guaranteed by Constitution and Laws of the United States	15
The Injustice of Refusing Habeas Corpus	18
Abuse of Power is Open to Review and Correction	19
Basic Principle of Personal Liberty	19
Seriousness of the Alleged Acts of Putnam and Hale, J.J., Merited a More Comprehensive Ruling from Circuit Court of Appeals	20
Analysis of Errors	21
Challenge to the Bar and People	24
District Court Not Consistent	26
Hearing Before U. S. Commissioner and its Relation to Denial of Due Process of Law	32
Proceedings in Maine	39
Webster's Opinion In re McLeod Case	40
Exclusion of Evidence	41
Mandatory to Accord Horn a Full Hearing	43
Jurisdiction at Issue	43
Indictment Not Conclusive	44
Entry Refused by Direction of Putnam, J.	45
Opinion of Marshall, C. J.	46
Frank Case Does Not Support Ruling of Circuit Court	49

Page

Fundamental Principles Disregarded 51
Circuit Court's Ruling that Allegations in Petition are Insufficient is Error 53
Allegations of Authority or Avowal of Acts Not Intended by Statute 54
Circuit Court's Ruling that Refusal to Consider Application in Maine Immaterial is Error 55
Events in Maine Ignored by Circuit Court 56
Denial of Due Process of Law 56
Warrant of Removal Void 58
ACT OF WAR 58
Did the Allegation in Petition Assert Commission of Acts the Validity and Effect of which Depends on the Law of Nations 60
What are Acts of War 62
Commission as an Officer Sufficient Authority to Commit Act 69
A National Act is Cognizable Only by Law of Nations . 70
Commission as Officer in German Army 71
An Officer is Amenable Only to his Own Government . 72
Authority May be Implied 73
Question of Punishment is for State Department, Not for Our Law Court 77
Summary 79

CASES, STATUTES AND PUBLICATIONS CITED.

Am. and Eng. Enc. of Law, 2d Edition, Volume 15, p. 198, 200 38
Abdys Kent. Int. Law, 491 77
3 Bl. Com. 135 15
Beavers v. Henkel, 194 U. S. 73 44
Bishop on Criminal Law, 17 Ed. p. 132 67
Bynershoeck, Chap. 4, p. 27 . . . . . 68, 76
Bas v. Tingy, 4 Wheaton, p. 40 68
Brig Alerto v. Blas Mornet, 3 Peters, 425 76
31 Car. I, c. 10, Sec. 8 15
Church on Habeas Corpus, 2d Edition, pp. 321, 323 . . 37, 38
Cohens v. Virginia, 6 Wheaton, 264, 404 . . . . . 46, 59
Cyc. Vol. 8, p. 1081 57
City of Topeka v. Dwyer, 70 Kan. 244 62
Chamberlain v. Bella, 18 N. Y. 115, 117 63
C. R. I. P. R. R. v. Alfree, 64 Iowa, 500 63
Carrington et al v. C. Ins. Co., 8 Peters, 522 66
Decker v. Judson, 16 N. Y. 439 62

Page

Dow v. Johnston, 100 U. S. 158 75
Ex parte Field, 5 Blatch, 69, 70 16
Ex parte Milligan, 4 Wallace 2 . . . . . 20, 49, 53, 57
Ex parte Chung Kin Tow, 218 Fed. Rep. 185 . . . . . 26, 30
Ex parte Jenkins, 2 Wall. Jr., 521, 528 37
Ex parte United States (October Term, 1915) 47
Frank v. Mangum, 237 U. S. 309, 332 . . . . . 49, 50
Fleming v. Page, 9 How. 603 74
Ford v. Surgat, 97 U. S. 594 75
Greene v. Henkel, 183 U. S. 249 44
Hastings Case, 219 Fed. Rep. 83 41
Hastings v. Murchie, 219 Fed. Rep. 83 . . . . . 43, 56, 58, 59
Haas v. Henkel, 216 U. S. 462 44
Hendee v. State, 80 Neb. 80 62
Hall on International Law, p 515 64
p. 517 72
Halleck on International Law, p. 305 65
p. 386 69
Ker v. Illinois, 119 U S. 440 . . . . . 27, 31, 57
124 Ky. 65 62
Kelley v. McCormack, 28 N. Y. 318, 321 62
Kirchbaum, 221 Pa. 521 62
1 Kent, pp. 94 and 96 69
Leeman v. Allen, 2 Wilson (English), 160 17
Lawrence's Principles of International Law, pp. 522-3 . 64, 66
p. 554 77
Lee on Captures, p. 141 68
Lawrence, Wheaton, p 518 68
pp. 626, 627 69
p. 248 74
Mahon v. Justice, 127 U. S. 708 27
McNichols v Pease, 207 U. S. 109 . . . . . 28, 29, 30, 37, 58
Mason v. Crabtree, 71 Ala. 471, 481 63
Miller v. The Resolute, 2 Dallas 68
Moore Digest, Vol. 7, p. 177 72
p. 178 73
Opinion Attorney General, pp. 46, 81 . . . . . 66, 69
Vol. 2, p. 271 77
Oppenheim on International Law, 2d Ed. (1912), Vol. 2, p. 439 78
Pettibone v. Nichols, 203 U. S. 192 . . . . . 27, 30
People v. McLeod, 25 Wendell, 483-586 . . . . . 40, 61
Price v. Henkel, 216 U. S. 488 44
3 Phillimore, pp. 115, 116, 120 68
Robb v. Connolly, 111 U. S. 624, 639 36

	Page
Revised Stat. Sec. 751-753 . . . 9, 14, 39, 40, 41, 54, 58,	73
Rawle on the Constitution, Chap. 21, p. 199	46
Richardson v. Crandall, 58 N. Y. 348, 361	63
2 Rutherford, p. 549; 18, 19	68
pp. 570, 580	69
3 Rob. 162, The Etrusco	76
Spelling, Extraordinary Remedies, 2d Ed., pp. 980, 981 .	15, 17
State v. Ely, 16 N. D. 569	62
State v. Oates, 86 Wis. 634	62
St. Albans Case, p. 403	64
p. 468	70
St. Albans, 400, citing Wheaton, 626, 627	65
Simmons cases on International Law, 497	77
Treaty with Prussia (1828) Art. I	20
Terlinden v. Ames, 184 U. S. 270	20
Tinsley v. Treat, 205 U. S. 20	41, 44, 58
Thorington v. Smith, 8 Wall, 1	75
U. S. Constitution, Art. I, Sec. 9	19
U. S. Rev. St., 2d Ed. p. 21	19
U. S. Constitution. Art. VI, Sec. 2	20
U. S. Constitution, Amendment XIV., Sec. 1	20
U. S. Constitution, Amendments IV and V	20
U. S. v. Shepard, 1 Abbott's U. S. Reports, 431, 433 . .	27, 37
U. S. v. Almeda (U. S. Cir. Ct.) 2 Wheel. Crim. (N. Y.) 570 .	41, 58
U. S. v. Pope, Fed. Cas. 16,059 (1878)	42
No. 16,069	44, 58
U. S. v. Milner, 36 Fed. 890, 891	61
174 U. S. 168	62
U. S. v. Palmer, 3 Wheaton, 610	69, 75
Underhill v. Hermandez, 168 U. S. 240	74
U. S. v. Rice, 4 Wheaton, 246	74
Williamson v. Lewis, 31 Penn. State, 9	15
Wales v. Whitney, 114 U. S. 564	37
Works of Daniel Webster, Vol. 5, p. 129	40
26 Wendell, 675	69, 70
pp. 635, 669	76
Williams v. Bruffy, 96 U. S. 176	75
Wheaton, pp. 266-7	75
p. 722	76
3 Wheaton, 435, The Anne	76

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 679.

WERNER HORN, APPELLANT,

v.

JOHN J. MITCHELL, UNITED STATES MARSHAL FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF OF PETITIONER, APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from a decree of the United States Circuit Court of Appeals for the First Circuit, issued under date of April 27, 1916, affirming the judgment of the District Court of the United States for the District of Massachusetts, issued June 28, 1915, refusing to issue a writ of habeas corpus to the petitioner, who is now in jail in the custody of the respondent for an act alleged to have been committed by the petitioner, who is a lieutenant in the German Army, domiciled in Germany, and who claims a right to have the writ issued in accordance with that part of the provisions of Section 753 of Revised Statutes which are as follows:—

> "The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, . . . or, being a subject or citizen of a foreign state,

and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection or exemption claimed under the permission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

The facts appear in the petition, and the amendment thereto (R. p. 2). **None of the allegations therein contained were traversed, therefore the facts as alleged and stated, stand as admitted.** The respondent filed a demurrer to the petition (p. 15), and after hearing upon demurrer the petition was dismissed June 28, 1915, by order of Morton, J. (R. p. 18), of the United States District Court for Massachusetts, from which order the petitioner appealed.

HISTORY OF ACT.

On Feb. 2, 1915, the international bridge (spanning the St. Croix River), and connecting Vanceboro, Maine, with McAdam, Province of New Brunswick, was partially destroyed by reason of an explosion which had taken place wholly within Canadian territory, no damage being done to that portion of the bridge located on American soil. A few hours subsequent to the explosion, the petitioner was apprehended at Vanceboro and admitted having caused the explosion. Representatives of the government of Great Britain petitioned for his extradition to the jurisdiction of that government, viz., Canada (R. p. 3), and on Feb. 20, 1915, by order of Hale, J., of the U. S. District Court for the District of Maine, a warrant for the arrest of the petitioner, based upon the aforesaid complaint of the British authorities, was issued.

At the time of the aforesaid explosion, war existed between Germany and Great Britain, and the province of

New Brunswick is territory within the confines of the British Empire.

The petitioner states (R. p. 7) that the bridge at Vanceboro was used by the British government for the transportation of vast stores of ammunition, implements of war, food stuffs and other materials used entirely by the British government in its efforts to defeat the German Army, of which he was an officer; that he was a belligerent officer, entitled by the law of nations to all the rights of a belligerent; that his act was directed at his country's enemy and he acted under his authority as an officer in the German Army.

HEARING BEFORE U. S. COMMISSIONER AT BANGOR, ME.

The petitioner was indicted at the February term of the U. S. District Court for the District of Mass., in the year 1915, charged with the offense that he did on Jan. 30, 1915, unlawfully, knowingly, wilfully and feloniously transport explosives from New York, through Massachusetts, to Vanceboro, Maine, contrary to law and in violation of United States Statutes applicable to the transportation and conveyance of explosives. By virtue of a complaint based on said indictment, made by the U. S. Attorney for the District of Maine, a warrant was issued March 4, 1915, by Frank C. Farrington, U. S. Commissioner for the said District of Maine, and on March 7, 1915, the petitioner was brought before Charles H. Reid, Jr., U. S. Commissioner for the District of Maine. On March 18, 1915, hearing was had before the aforesaid Commissioner Reid, at Bangor, Maine.

In lieu of pleading to said indictment, the petitioner offered a special plea, setting forth that the act upon which he stood accused was inseparably connected with

an act of war, and that he was not amenable to the municipal laws of the United States (R. p. 4).

The plea was not traversed by the United States, and the petitioner declining to plead to the indictment otherwise than by said special plea which the Commissioner overruled, the said U. S. Commissioner entered in behalf of the petitioner a plea of " Not Guilty ".

The United States, after having offered the indictment, rested. The petitioner then introduced in evidence an affidavit, in support of his special plea, that he was subject only to the law of nations, which affidavit was duly admitted (R. p. 6).

The petitioner than offered evidence, which was received, bearing upon the aforesaid affidavit and special plea. This evidence is briefly summarized in the Record (pp. 7 and 8).

EXCLUSION OF EVIDENCE.

Against the objection of the petitioner and, as the petitioner alleges, in violation of his rights, evidence in the form of written documents and the oral testimony of witnesses then in attendance before the Commissioner was excluded (R. pp. 8, 9 and 10).

The United States offered no evidence to overcome the affidavit and evidence introduced by the petitioner. The U. S. Commissioner then issued an order committing the petitioner to the custody of the United States Marshal for the District of Maine, ordering your petitioner to furnish bail in the sum of ten thousand dollars for his appearance before the District Court of the United States for the District of Maine.

FAIR HEARING DENIED.

The petitioner says that he was not given a fair hearing by the aforesaid U. S. Commissioner Reid, that evidence essential and important to his defense was wrongfully excluded, that the United States had not overcome the defense comprised by the evidence of the petitioner as introduced, that the mere record of the indictment was not sufficient to warrant a finding that probable cause was established, and that on all the evidence the petitioner was entitled to be discharged from custody. The petitioner in his petition further contends that the act of the aforesaid U. S. Commissioner Reid, and the manner in which the said hearing proceeded, was a violation of rights guaranteed to the petitioner by the Constitution and laws of the United States and existing treaties between Germany and the United States, and that the jurisdiction of the U. S. District Court of Mass. and of the U. S. Commissioner did not extend to the act under which he was indicted because it was an act of war that made him subject to the law of nations.

On March 23, 1915, an order was issued by Putnam. J., of the U. S. Circuit Court of Appeals for the First Circuit requiring the U. S. Marshal to produce the petitioner (Lieutenant Horn) before the U. S. District Court, to be held at 10 A.M., March 25, at Portland, Me., to answer to the petition of the U. S. District Attorney, praying for a warrant to issue directing the removal of the petitioner (Lieutenant Horn) to the District of Mass. (R. p. 9). The aforesaid order was signed as follows: —

"WILLIAM L. PUTNAM,
Assigned to hold December Term, 1914,
United States District Court, Maine District."

The Honorable Clarence Hale, United States District

Judge for the Maine District, was absent from the State of Maine and holding Court at Boston, Mass.

REFUSAL BY PUTNAM. J., TO ALLOW PETITION FOR HABEAS CORPUS TO BE FILED.

The petitioner, at 9.30 A.M. on the 25th day of March, 1915, or one-half hour prior to the convening of the District Court, presented to the clerk of the U. S. Court for the District of Maine a petition for the issuance of the writ of habeas corpus and asked that the same be received and immediately submitted to the judge assigned to hold the session of the U. S. District Court which was to convene at 10 A.M. on the same day. Notice that such a petition would be filed had, on March 24, 1915, been given to the U. S. Attorney. The aforesaid clerk of court refused to accept the said petition, giving as his reasons therefor that the aforesaid Putnam, J., had ordered that habeas corpus petitions could not be accepted by the said clerk until first submitted to the said Putnam, J. The said Putnam, J., was at once notified that the petitioner requested to submit the aforesaid habeas corpus petition, prior to the convening of court for consideration of the petition for removal of the petitioner (Lieutenant Horn) to Massachusetts. **A hearing on said habeas petition was denied by Putnam, J.** (R. pp. 9, 10).

PUTNAM, J., REFUSED TO CONSIDER HABEAS CORPUS PETITION.

When the session of the District Court, presided over by Putnam, J., opened at 10 o'clock A.M., the petitioner immediately and prior to any consideration whatsoever being given to the petition for removal (R. p. 10) presented his habeas petition and asked that he be heard in relation to the same, and prior to taking up the removal petition. **The said Putnam, J., refused to give any consideration to**

the habeas petition. The petitioner then asked that the habeas petition be ordered filed, calling to the attention of the presiding justice that the clerk of court refused to accept same for filing unless so directed by Putnam, J., because of instructions from Putnam, J., heretofore referred to. This request was also denied. Petitioner renewing his request for consideration of the habeas petition, stated to the said Putnam, J., in open session of court, that refusal by the latter to give a hearing or any consideration to the habeas petition, prior to action upon the removal petition, unlawfully and in violation of rights guaranteed to the petitioner, deprived the latter of any opportunity to present the habeas petition to any other U. S. judge, inasmuch as U. S. District Judge Hale was absent from the jurisdiction of the Maine court, and no other U. S. judge was within the jurisdiction. The renewed request was refused. Putnam, J., was then informed by your petitioner that refusal to hear the habeas petition would result in the petitioner being removed from the Maine jurisdiction, in violation of rights guaranteed the petitioner by the Constitution and laws of the United States and existing treaties. Further demand for a hearing on the habeas petition was voiced in behalf of the petitioner, and met with denial.

PETITIONER NOT ALLOWED TO STATE CONTENTS OF PETITION.

At no time was the petitioner allowed to read or state the contents of the petition, even in part, and was deprived of opportunity to file it with the presiding justice of the court, or with the clerk during session of the court or prior to convening the court, or in any other manner that would give it record entry as of time prior to taking up the removal petition.

Immediately after aforesaid denials the said Putnam,

J., issued an order (R. pp. 10 and 11), directing the Marshal to remove the petitioner to the jurisdiction of the U. S. District Court of Mass.

REFUSAL BY HALE, J., TO ENTERTAIN PETITION FOR HABEAS CORPUS.

Subsequent to the issuance of the aforesaid order it was learned that Honorable Clarence Hale, Judge of the U. S. Court for the District of Maine, would be within the jurisdiction of said court at or about 4.25 o'clock P. M. of the same day, to wit, March 25, 1915. At or about 4.25 o'clock P. M., and while your petitioner was still within the Maine jurisdiction, viz., confined in the Cumberland County jail, Portland, Me., a petition for the issuance of a writ of habeas corpus was presented to Hale, J., at Portland, Me. **The latter refused to receive same or to read its contents even in part.** The said Hale, J., was informed by the petitioner that earlier in the day Putnam, J., refused to receive or accord any consideration to said petition, and that an order for the removal of the petitioner to Massachusetts has been issued and would be executed at or about 6.05 o'clock P. M. of said 25th day of March, unless the said Hale, J., gave an immediate hearing.

It was then brought to the attention of Hale, J., that Putnam, J., and himself were the only U. S. judges at that time within the Maine jurisdiction, and unless either gave consideration to the aforesaid habeas petition, the petitioner would be wrongfully removed to the District of Massachusetts; that such a course of action, in the face of the petitioner's repeated demands to be heard on his habeas corpus petition, unjustly, unfairly, unconstitutionally, without due process of law and in violation of existing treaties between the United States and the Empire of Germany and the Kingdom of Prussia, deprived

your petitioner of his right to be heard on such habeas corpus petition seeking release from custody and his liberty, as provided in Section 753, Rev. St. of the United States (R. p. 14). The said Hale, J., continued his refusal to accord any hearing, and subsequent thereto the petitioner was removed immediately from the Cumberland County jail at Portland, Me., to the jurisdiction of the U. S. District Court for Massachusetts (R. p. 11).

PETITION FOR HABEAS CORPUS SUBMITTED TO MORTON, J., IN MASSACHUSETTS.

The next morning, March 26, 1915, the petitioner was brought before the Hon. James Morton, Jr., Judge of the U. S. District Court for the District of Mass., to plead to the indictments found against him by the U. S. Grand Jury for the District of Mass. (R. pp. 11 and 12). The petitioner announced his intention to file a petition for habeas corpus and a continuance to April 5, 1915, was granted in the matter of pleading to the indictments. The petitioner was ordered to furnish bail in the sum of $10,000, or in lieu thereof to stand committed in the custody of the United States Marshal for the District of Mass. (R. p. 12). The respondent, John J. Mitchell, on April 1, 1915, qualified as United States Marshal, and had custody of the petitioner on April 2, 1915, when the petition for the issuance of a writ of habeas corpus, addressed to the United States District for the District of Mass. was presented and filed with the clerk of the said court (R. p. 12).

The aforesaid petition for the issuance of the writ of habeas corpus (see Record) sets forth in detail the violations of rights complained of, and the allegations upon which relief from custody was based. The respondent, John J. Mitchell, was ordered to show cause on or before

May 5, 1915, why the writ should not issue. To this petition a demurrer was filed April 10, 1915 (R. p. 15).

On April 23, 1915, a hearing on the aforesaid demurrer was held. The arguments were confined strictly to the question, whether or not a petition for habeas corpus could be attacked by demurrer. The petitioner contended it was his right to be accorded a hearing on his petition, at which he could fully and comprehensively present evidence entitling him to the issuance of the writ, and his right in that respect could not be abridged by demurrer. The court on May 11, 1915, rendered an opinion which in effect sustained the demurrer (R. p. 18), and on June 28, 1915, an order dismissing the petition was issued by Morton, J.

The petitioner on September 27, 1915, filed an appeal to the Circuit Court of Appeals, and as of same date filed an assignment of errors (R. p. 22). On April 27, 1916, the Circuit Court handed down its opinion (R. p. 26), and as of same date issued its order affirming the ruling of the District Court (R. p. 31). The petitioner on September 13, 1916, filed an appeal to the Supreme Court of the United States (R. p. 31), and as of same date filed an assignment of errors (R. p. 32).

The petitioner is now, and has been since March 26, 1915, confined in jail in the custody of the respondent.

ARGUMENT.

The facts upon which the petitioner bases his statement of errors (R. p. 32) present an extraordinary and perhaps unprecedented situation. The petitioner relying upon the fundamental principle of American liberty that any person within the confines of the United States under arrest and believing his arrest illegal and unwarranted could obtain a speedy determination of his rights by petitioning for the issuance of the habeas corpus writ, seasonably presented a petition addressed to the Federal Judge at Portland, Maine. He was not allowed to file it with the clerk of the United States District Court for Maine, the clerk stating that instructions to that effect (R. p. 10) had issued from United States Circuit Judge Putnam, then present in the courthouse, who at the hour and day was the only United States judge within the territorial jurisdiction of the Maine District Court. The petitioner next was refused opportunity (R. p. 10) to present his petition to the aforesaid judge in chambers and before the convening of a session of court, specially called to act upon a petition praying for the removal of the appellant to Massachusetts. When the court convened, and before the removal proceedings began, the petitioner was in open court denied the right to present his petition (R. p. 10), or to be heard in respect to it, or to have it accorded any consideration. Judge Putnam then ordered the petitioner removed to the Massachusetts jurisdiction (R. p. 10). By these illegal acts, the court's mandate to remove the petitioner from the Maine jurisdiction, in defiance of the privileges of the habeas corpus writ, was obeyed by United States Marshals. Hale, J., another United States Judge, who had unexpectedly arrived at Portland, Maine, late in the day and prior to the removal of the petitioner to Massachusetts, was

appealed to for relief from the alleged illegal acts of Putnam, J., but Hale, J., refused to accord any consideration to a new habeas petition presented to him (R. p. 11), which recited the aforesaid illegal acts of Putnam, J.

DENIAL OF FUNDAMENTAL RIGHTS.

The above briefly described denial of fundamental rights, guaranteed by the Constitution and laws of the United States, resulted in the petitioner being forcibly removed from the jurisdiction of the Maine District Court to that of the Massachusetts District Court, which latter Court denied the petitioner the right under another and new habeas corpus petition to a hearing upon the above enumerated violations of the petitioner's rights, which in effect decided that the laws of the United States do not provide any means whereby one who makes such a serious complaint against the acts of judges of the United States courts can obtain relief or correction of the injury done him.

The Circuit Court of Appeals in its opinion (R. p 26). did not address itself to the alleged errors of the District Court of Massachusetts, in respect to the refusal to allow the petitioner to be heard upon his complaint that the great writ of habeas corpus, and the right of petition accompanying it, had been boldly cast aside, its functions suspended, and its almost sovereign powers crushed by the acts of Putnam, J., who made the organic and statute law and the Constitution subservient to his own arbitrary rules. The Circuit Court says (R. p. 30):

> "it is immaterial whether an earlier petition to the same unmeritorious effect was or was not erroneously refused consideration. Our conclusion that the grounds upon which the appellant seeks a discharge are unsound cuts under all other questions."

The petitioner respectfully appeals to the highest judicial tribunal of the nation to say that, upon a petition properly setting forth the allegations of wrong and injustice, it is material (in fact, the spirit of American liberty and the independence and integrity of United States courts requires) that the Circuit Court should have ruled whether the laws or courts do provide means to obtain relief from such extraordinary and unprecedented abuse of judicial power as was instanced in the Maine jurisdiction and ratified by the ruling of the Massachusetts Court. And the petitioner respectfully urges also that the highest court of the land should declare in no uncertain terms that there is no conclusion of law that makes possible the sanction of a doctrine that acts of United States judges in refusing to permit a habeas corpus petition to be filed, presented in open court, or accorded any consideration whatsoever, can be "cut under" or denied appellate judicial review.

"CUT UNDER" PROCESS.

The main issue of the appeal, viz., the right of any person to seek relief from an alleged wrongful imprisonment, cannot so easily be "cut under" by judicial interpretation without impairing the foundation of the habeas corpus writ, and building a judicial shelter that will afford questionable refuge to those desiring to ignore and violate fundamental law. Its "cut under" effect will be the establishment of a precedent, to be recorded in the reports of the highest judicial tribunal of the land that judicial might, exercised by a judge bold enough to ignore the Constitution and laws of the country, can be made into right by a "cut under" process, even though it "cuts under" a bulwark of American liberty, thereby declaring there can be no remedy for such a great wrong.

There is another and equally important principle of fundamental law at issue, based upon the opinion of the

District Court of Massachusetts sustaining the demurrer to the petition filed in that court, thereby refusing the petitioner not only the right to present evidence in support of the general allegations contained in the petition, but to get a hearing in any form. The record as it comes before this Court discloses that two judges refused to accord any consideration to the habeas petition presented in Maine, and a third judge sustained a demurrer, thereby shutting off a hearing on the petition presented in Massachusetts. The petitioner says that the Massachusetts petition was entitled to a hearing, and the Circuit Court of Appeals erred in not thus ruling.

PETITION WITHIN SECTION 753 U. S. REVISED STATUTES.

The Massachusetts petition was within the provisions of Section 753, Revised Statutes (quoted at p. 1 of this brief and R. p. 20). The petition stated:—

(A) That the petitioner was in custody under the authority of the United States (R. p. 2);

(B) That he was committed for trial before a United States Court (R. p. 5);

(C) That he was in custody for an alleged violation of a law of the United States (R. p. 12);

(D) That he was in custody by order of the Judge of a United States Court (R. p. 12);

(E) That custody of the petitioner was in violation of the Constitution and laws of the United States (R. p. 13);

(F) That custody of the petitioner was in violation of a treaty of the United States (R. p. 13);

(G) That the petitioner was a subject and citizen of a foreign state and domiciled therein (R. p. 17);

(H) That he was held in custody for an alleged act done under the right, title, authority, privilege, protec-

tion and exemption claimed under a commission held by him as an officer in the army of a foreign government (R. p. 17);

(l) That punishment, if any, for his alleged act depended upon the law of nations (R. pp. 5–17).

The petition filed in Massachusetts stated, not one, but many allegations, all falling within the provisions of Section 753. A hearing, upon those allegations that he might establish by evidence their value and weight, was his right. The Massachusetts petition also stated fully and clearly allegations of judicial abuses within the Maine jurisdiction, alleging that the removal to Massachusetts was in violation of the Constitution and laws of the United States, and that due process of law had been denied him. In the face of all the allegations enumerated a hearing was refused, and the petitioner is now before this Court asking for a ruling that will say definitely whether Putnam, J., Hale, J. and Morton, J. can be sustained in their refusal to accord the petitioner a hearing.

Habeas Corpus Rights Guaranteed by Constitution and Laws of the United States.

The history of the writ and its enactment into Constitutions and legislative statutes, together with the enactment of laws providing strictly for the recognition of the protection guaranteed to a petitioner, makes manifest that practically all legislation relating thereto was and is aimed to make impossible a refusal to grant consideration to a petition for the issuance of the writ.

3 Bl. Com. 135.
31 Car. I, c. 10, Sec. 8.
Spelling (*supra*), p. 981.
Williamson v. *Lewis*, 31 Penn. State, 9.

No Federal Court, and even the President of the United States in time of war cannot, without authority from Congress, suspend the writ. While it may be argued that the Constitutional prohibition against suspension of the writ means refusal to issue the writ after cause therefore is established, it is obvious such an argument is futile, for how could a petitioner state a cause if he is flatly and unreservedly refused the right to enter his petition in court, to state its contents, or to have it considered in any form. Such a course of action is a far more flagrant violation of rights guaranteed by the United States Constitution than would be a refusal to issue the writ after a full hearing. In *Ex parte Field*, 5 Blatchford, at pp. 69, 70, the Court said: —

> "Our revolutionary fathers having after eight years of desolating war, achieved their independence of the British crown, were so jealous of their liberty, and so determined to protect it against any further encroachments of power, that they were not satisfied to leave it with the safeguards that appear in the Constitution which was submitted on the 17th of September, 1787; but in 1789, they submitted to the several States ten amendments thereto, which were duly ratified before 1791, in order to give more certain and complete protection to the liberty and rights of the citizen. How futile were all their efforts, if the doctrine contended for in this case is to prevail. That liberty which they held so dear, and guarded with such jealous care, has much less protection than it had under the British crown. If the arrest and detention in this case be sustained it strikes a much more deadly and fatal blow to civil liberty than did the general warrants which the British cabinet ordered to be issued against the

printers and publishers of the North Britain, numbered 45, in 1763."

The Court then went on to quote from Chief Justice Pratt, in *Leeman* v. *Allen,* 2 Wilson (English), 160:—

> "But the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life, did not appear to the jury in that striking light, in which the great point of law, touching the liberty of the subject, appeared to them at the trial. They saw a magistrate over all the King's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom by insisting upon the legality of this general warrant before them. They heard the King's counsel, and saw the Solicitor of the Treasury endeavoring to support and maintain the legality of the warrant in a tyrannical and severe manner."

And the United States Circuit Court commenting on the foregoing then added (p. 71):—

> "Is the British Magna Charta any more sacred than the United States Constitution?"

Spelling, Extraordinary Remedies, 2d Ed., p. 980, summarizes the great privileges of the writ, and its part in our governmental system, in the following language:—

> "But the writ of habeas corpus in England and America has not only been rendered a more complete and efficacious remedy for illegal imprisonment in all cases than any similar process in any other country, but it has also been raised to the importance and clothed with the power of a political principle, so that while, and because it is an invaluable and incomparable protection of personal liberty, it is also in turn

protected by the highest power in the State, constitutional and legislative, as a cherished popular right and safeguard of civil liberty."

THE INJUSTICE OF REFUSING HABEAS CORPUS.

The record discloses that at—

9.30 A.M., on March 25, 1915, your appellant (R. p. 9) presented his habeas corpus petition at the District Court in Maine; when Putnam, J., refused to entertain it; that at—

10.00 A.M., the Court convened (R. p. 10) and then declined to receive or consider it, but did issue the warrant of removal; that at—

4.25 P.M., the petition was presented (R. p. 11) to the only other judge with jurisdiction to issue a habeas corpus in the District of Maine; that said judge refused to entertain the petition; and that at—

6.05 P.M., the petitioner was removed (R. pp. 11, 12) out of the district, and brought before the District Court for the District of Massachusetts on March 26, 1915 (R. pp. 12, 13, 14).

Morton, J. (R. I.), ruled (R. p. 21):—

"When an order of removal is made by a judicial officer in another district having power to act in such matters, and appears upon its face to be regular, and is based upon an indictment properly returned and appearing on its face to charge a crime within the jurisdiction of the grand jury returning it, this Court ought not to go behind the order of removal, nor to examine the alleged mistakes in reference thereto of the judicial officer by whom it was made."

The reasoning of Morton, J., is that no matter how

great the wrong or abuse of power, in taking an alleged fugitive from one jurisdiction to another, the Court before which the prisoner is brought "ought not to go behind the order of removal".

ABUSE OF POWER IS OPEN TO REVIEW AND CORRECTION.

Do the Constitution and laws of the United States permit of enacting into the law of the country via the ruling of a judge of a U. S. District Court, approved by the Circuit Court of Appeals, a doctrine that staggers with its autocratic finality of decision the mind taught to believe that judicial abuse of power can and will be open to redress and correction?

The revolt of the American Colonists against the writs of assistance and the judicial abuse of power giving those writs life, and tyrannical power, was based upon far less cause for grievance.

BASIC PRINCIPLE OF PERSONAL LIBERTY.

The ruling of the Circuit Court, that "the grounds upon which the appellant seeks discharge are unsound cuts under all other questions", is fundamentally erroneous and it strikes at a basic principle of personal liberty as guaranteed by the Constitution and laws of the United States.

United States Constitution, Art. I, Sec. 9, provides: "The privilege of the writ of Habeas Corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it."

U. S. Rev. St., 2d Ed., p. 21.

Due process of law was guaranteed the petitioner by the Constitution and laws of the United States and existing treaties.

U. S. Constitution, Art. VI, Sec. 2.
U. S. Constitution, Amendment XIV, Sec. 1.
U. S. Constitution, Amendments IV and V.
Treaty with Prussia (1828), Art. I.
Terlinden v. *Ames*, 184 U. S. 270.

It was held in *Ex parte Milligan*, 4 Wallace, 2: "A petition for a writ of habeas corpus duly presented is the institution of a cause on behalf of the petitioner; and the allowance or refusal of the process, as well as the subsequent disposition of the prisoner, is a matter of law and not of discretion."

SERIOUSNESS OF THE ALLEGED ACTS OF PUTNAM AND HALE, J.J., MERITED A MORE COMPREHENSIVE RULING FROM CIRCUIT COURT OF APPEALS.

The Circuit Court of Appeals did not discuss the allegations of error pertaining to the acts of Putnam, J. and Hale, J. The only part of the opinion approaching a discussion of these serious allegations is confined to that portion of the opinion (R. p. 40) reading:—

> "We agree with the contention of the United States attorney that if the present petition cannot be maintained on its merits it is immaterial whether an earlier petition to the same unmeritorious effect was or was not erroneously refused consideration. Our conclusion that the grounds upon which the appellant seeks a discharge are unsound cuts under all other questions raised."

It is apparent, therefore, that the Circuit Court of Appeals attempted to evade the issues.

The Circuit Court cites no case to support its conclusion. Surely, such direct, unequivocal allegations of wrongful acts on the part of Putnam, J., and the importance of the principles pertaining to personal liberty

thereby raised, should not be brushed aside in such a summary manner.

The petitioner, believing himself entitled, in fullest measure, to his rights which were violated by Putnam and Hale, J.J., before his removal from Maine, contends that it is preposterous for the Judge of the Massachusetts District Court to say in relation to the acts of Putnam and Hale, J.J., "It is not the business of the court to revise or correct" such a palpable violation of due process of law; and it is equally preposterous for the Circuit Court to say "it is immaterial" that a petition to redress wrongs is refused consideration (R. p. 30).

ANALYSIS OF ERRORS.

The petitioner alleges thirteen errors on the part of the Circuit Court of Appeals. These will be taken up in order, except where grouped to save repetition of discussion:

FIRST ERROR. **In affirming the decree of the District Court** (R. p. 32).

SECOND ERROR. **In not ruling that the application for the writ of habeas corpus should have been granted by the District Court** (R. p. 32).

The foregoing errors will be discussed at length in the general summary.

THIRD ERROR. **In not ruling that the petitioner was removed from Maine to Massachusetts without due process of law** (R. p. 32).

This assignment of error must be considered in its relation to the 4th, 5th, 6th, 7th, 8th and 9th errors. All deal with the acts of Putnam and Hale, J.J., prior to the removal of the petitioner from Maine to Massachusetts. It is to be borne in mind in relation to these allegations of error that the Circuit Court of Appeals affirmed the ruling of Morton, J., of the Mass. District Court, in sustain-

ing the respondent's demurrer and dismissing the petition without allowing a hearing.

The 4th, 5th and 6th errors will be grouped as one for the purposes of discussion.

FOURTH ERROR. **In not ruling that Putnam, J., who presided at the hearing before the United States District Court for the District of Maine on March 25, 1915, in refusing to hear or consider the petition for a writ of habeas corpus, seasonably filed and presented by the petitioner, acted in violation of rights guaranteed to the petitioner by the Constitution and laws of the United States and existing treaties between the United States and the Empire of Germany and the Kingdom of Prussia.**

FIFTH ERROR. **In not ruling that the refusal of Putnam, J., to permit to be filed, to read or hear read, or to give any consideration whatsoever to a petition for the issuance of a writ of habeas corpus, when seasonably presented, denied the privileges and right of the writ of habeas corpus guaranteed by the Constitution and laws of the United States, and was in itself a violation of the rights of the petitioner guaranteed by the Constitution and laws of the United States thereby entitling the petitioner to be heard on the petition presented to the Mass. District Court, for the purpose of determining whether or not an order should issue for his return to the District of Maine, therefore a cause for the issuance of the writ by the Mass. Court was stated, and the sustaining of the respondent's demurrer, denying the petitioner a hearing on his petition, was erroneous.**

SIXTH ERROR. **In not ruling that the refusal of Judge Clarence Hale to read or hear read, or to give any consideration whatsoever to a petition for the issuance of a writ of habeas corpus, when seasonably presented, denied the privileges and right of the writ of habeas corpus guaran-**

teed by the Constitution and laws of the United States, and was in itself a violation of the rights of the petitioner guaranteed by the Constitution and laws of the United States, thereby entitling the petitioner to be heard on the petition presented to the Mass. District Court, for the purpose of determining whether or not an order should issue for his return to the District of Maine, therefore a cause for the issuance of the writ by the Mass. Court was stated, and the sustaining of the respondent's demurrer, denying the petitioner a hearing on his petition, was erroneous.

Morton, J., did not meet the issue raised in the 17th, 18th, 21st, 22d, 24th, 25th, 31st and other paragraphs of the habeas petition (R. pp. 10–14), all of which specifically and clearly alleged that the petitioner had by the acts of Putnam and Hale, J.J., been denied due process of the law, guaranteed him by the Constitution and laws of the United States and existing treaties. The petitioner was entitled to a finding in his favor, inasmuch as Morton, J., in sustaining the demurrer was denying the petitioner a right to be heard upon the general allegation of the denial of due process of law. What Morton, J., attempted to do was to turn the case of the petitioner from a judicial review of the acts of Putnam and Hale, J.J., to a consideration of the question as to the power of the District Court of Mass. to review proceedings of the District Court of Maine. And the principal issue, relating to a denial of due process of law, is still further clouded by that portion of the decision of Morton, J., pertaining to the validity of removal warrants.

Morton, J., says that he judged this warrant "on its face" (R. p. 21). He certainly avoided any discussion of the causes that gave it life and liberty-destroying power.

A hearing upon the merits of habeas corpus petition before Morton, J., would have permitted the petitioner the

opportunity to establish that due process of law had been denied him by Putnam and Hale, JJ., and by the U. S. Commissioner at Bangor, Me. (R. p. 13). It follows, therefore, that the dismissal of the petition without a hearing was erroneous.

Morton, J., says (R. p. 21): "From the allegations in the petition, it is clear that all formalities required by law in connection with the order of removal were observed." The petitioner seriously questions this conclusion. A fundamental principle regulating the observance of the "formalities of law" is, that all laws directly pertaining to the proceedings in operation must be observed. Denial of the right to enter in court a habeas corpus petition, or to be heard in relation to the same, is not an observance of the "formalities required by law".

And again Morton, J., says (R. p. 21): "What the petitioner complains of is, therefore, not that there is a defect in the removal proceedings." . . . Is not the denial of the right to be heard on a habeas corpus petition, under the extraordinary circumstances already related and set forth fully in the habeas corpus petition presented to Morton, J., a defect? Can a removal warrant be said to be without a defect when it is a form of process springing from a gross disregard for a principle of law, written into the Constitution of the U. S., strengthened by U. S. Statutes, and originally given life, force and effect by Magna Charta?

CHALLENGE TO THE BAR AND PEOPLE.

Morton, J., further says (R. p. 21): "It is not the business of this Court to revise or correct judicial proceedings in the State of Maine. It has not the power to do so." Such a conclusion of law when approved by the Circuit Court of Appeals (if correct) acts as a mantle of judicial protection thrown over the acts of Putnam and Hale, JJ. It is a challenge to the bar and the people. If unanswered

and not corrected by this tribunal, grave results may follow in future treatment of habeas corpus petitions. The answer must be made by this Court. It is perhaps a correct assertion to point out that never before has a similar challenge to the final judgment and broad appellate powers of this Court been made by the inferior courts. The decision of Morton, J., as affirmed by the Circuit Court must be overruled, or other district (and State) courts will accept it as an approved precedent.

The conclusion of law as stated by Morton, J., is neither well founded or logical. There are hundreds of cases annually wherein alleged fagitives are transferred from the jurisdiction of one U. S. District Court to another — from San Francisco to New York; from Indiana to Massachusetts; from Texas to Ohio, etc. If the logic of the conclusion of Morton, J., was carried to its ultimate end, it would mean that no matter how gross the denial of due process of law in the district from which the alleged fugitive is extradited, no relief would be open in the State to which he would be taken for trial. He would be obliged to stand trial, and those who denied him due process of law would laugh at his unhappy plight or boast of their immunity from review or correction. Of what avail is the guarantee of due process of law if there is no remedy to enforce it, or to punish those who deny its operation? Affirmation of such a doctrine would be to invite judges to defy the great prerogatives of habeas corpus, to deny petitions the right of entry in courts, to refuse hearings or consideration in any form; to encourage the kidnapping of alleged fugitives, to bow to the will of prosecuting officials as well as administrative and ministerial officers. Offending officers would have only their own conscience as a check on the exercise of powers similar to those which created Magna Charta, unless perhaps an aroused

people made the proper legislative body remove the offending judge.

DISTRICT COURT NOT CONSISTENT.

Morton, J., is not consistent in the reasoning he applied to the case at bar. An opinion written by him in the case, *Ex parte Chung Kin Tow*, 218 Fed. Rep. 185, is a sufficient corroboration of the assertion of inconsistency. The case involves the right to be heard upon a habeas corpus petition prior to removal to a demanding jurisdiction upon an extradition or removal warrant. The Chinese petitioner was arrested in Massachusetts, charged with murder committed in Chicago, Illinois. The Chicago police named the murderer as Harry Eng Fong, and the petitioner when arrested under the name of Chung Kin Tow was charged with using the latter name as an alias, whereas he actually was Harry Eng Fong. The prisoner asserted that he was not Harry Eng Fong, the alleged murderer. The Governor issued a warrant for the removal of the prisoner to Illinois. Then followed the filing of a habeas corpus petition in the U. S. District Court for Massachusetts. Morton, J., in the opinion, cited says:—

> "(1) **That this question is open upon habeas corpus proceedings, either in the federal or the state courts, seems to be settled. McNichols v. Pease, 207 U. S. 100 (and other cases cited). . . .**
>
> "**The prisoner plainly has a right to be heard upon the questions involved in his extradition.** *Robb* v. *Connolly*, 111 U. S. 624. **And it seems to follow that his hearing shall be before the Court upon habeas corpus proceedings.** Cases *supra;* Rev. Laws. Mass. c. 217, Sec. 14."

The foregoing decision by Morton, J. (handed down April 30, 1914; the opinion in this case handed down

May 11, 1915) establishes clearly that it should have been recognized by him that due process of law had been denied the present appellant. Again, Morton, J., says that he cannot review or correct judicial proceedings in Maine. This in the face of actual direct knowledge that the petitioner for habeas corpus before him was denied an enforcement of the due process of law principle that Morton, J. (following the U. S. Supreme Court) correctly stated in the case decided by him a year earlier.

Morton, J., cited *U. S.* v. *Shepard*, 1 Abbott's U. S. Reports, 431, 433, in support of his ruling that the District Court of Mass. (R. p. 21) " ought not to undertake to go behind the order of removal nor to examine the conduct and alleged mistakes in reference thereto, of the judicial officer by whom it was made". The Circuit Court of Appeals in affirming that ruling cited no supporting cases. The Shepard case (*supra*) does not support Morton, J. Its true interpretation will be discussed later. The position of the respondent is in effect that the actual presence of the prisoner within the jurisdiction where he is arraigned for trial bars all questioning into the legality of the proceedings in the jurisdiction from which he was removed. In support of that position the respondent has relied on: —

Pettibone v. *Nichols*, 203 U. S. 192.
Mahon v. *Justice*, 127 U. S. 708.
Ker v. *Illinois*, 119 U. S. 440.

The three cases above cited are the strongest of the line urged by the respondent as supporting the doctrine that an alleged fugitive who has been brought within the jurisdiction where he is held for trial cannot by any Court process compel his return to the State jurisdiction or country from which he was taken whether by force, direct disregard of protecting laws, or other means.

The reports of this Court do not contain a case similar to the one at bar; neither do the reports of the U. S. Circuit Court of Appeals. And so far as the petitioner's exhaustive research has gone no precedent directly in point was found. Heretofore practically all alleged illegal removal cases submitted to this Court have been those involving prosecutions before State courts. They have raised questions pertaining directly to conflict of State laws and the relative sovereign rights of a particular State to retain for prosecution a fugitive within its borders. Some of the cases deal with forcible removal from other countries. The case at bar does not raise any question of State rights. It is wholly within the United States courts. The issue narrows down to resort by the respondent to a doctrine enunciated for the guidance of States.

The reports of this Court do not contain a decision wherein it appears that, prior to removal, the petitioner had petitioned for the habeas corpus writ, submitted the same seasonably to the Court before which removal proceedings were pending, and was denied a hearing on his petition and subjected to other acts of alleged denial of due process of law as presented in this case. This Court therefore finds no actual precedent of its own making as a guide to its conclusion in the case at bar. There are several cases, however, which indicate very plainly that this Court had anticipated part of the problem the case at bar presents, viz., a removal in defiance of habeas corpus proceedings. (See *McNichols* v. *Pease*, 207 U. S. 109, and cases therein cited.) And the very cases the respondent relies upon state or infer exceptions which would apply to the rule contended for by the respondent.

It is clearly apparent that this Court has in a rather long line of so-called "removal" cases endeavored to state the law with a clearness that would save continued recourse to its appellate powers.

In *McNichols* v. *Pease* (*supra*), it summed up all the important cases and the doctrines of each, and then, at page 109, said: —

> "Some of the questions discussed at the bar have been concluded by decisions in former cases involving the meaning and scope of the above constitutional and statutory provisions. We will not extend this opinion by giving a full analysis of those cases. It is sufficient to say that the following principles are to be deduced from *Robb* v. *Connolly*, 111 U.S. 624, 639; *Ex parte Reggel*, 114 U.S. 642, 652, 653; *Roberts* v. *Reilly*, 116 U.S. 80, 95; *Hyatt* v. *Corkran*, 188 U.S. 691, 719; *Munsey* v. *Clough*, 196 U.S. 364, 372; *Pettibone* v. *Nichols*, 203 U.S. 192, and *Appleyard* v. *Massachusetts*, 203 U.S. 222. . . ."
>
> "6. A proceeding by habeas corpus in a court of competent jurisdiction is appropriate for determining whether the accused is subject, in virtue of the warrant of arrest, to be taken as a fugitive from the justice of the State in which he is found to the State whose laws he is charged with violating.
>
> "7. One arrested and held as a fugitive from justice is entitled, of right, upon habeas corpus, to question the lawfulness of his arrest and imprisonment, showing by competent evidence, as a ground for his release, that he was not, within the meaning of the Constitution and laws of the United States, a fugitive from the justice of the demanding State, and thereby overcoming the presumption to the contrary arising from the face of an extradition warrant."

Harlan, J., in paragraph 7, voiced the position of the appellant in the case at bar when he used the following words: —

> "One arrested and held as a fugitive from justice is entitled of right, upon habeas corpus, to question the lawfulness of his arrest and imprisonment. . . ."

The right referred to is guaranteed by the United States Constitution.

The Circuit Court of Appeals in affirming the ruling of Morton, J., did not discuss *McNichols* v. *Pease* or other cases directly relating to it, though the petitioner placed much stress upon the importance of the case. It was before the Circuit Court that the petitioner, in the habeas petition presented to Morton, J., which was dismissed without a hearing, had been denied due process of law, when the petitioner acting, as is pointed out in *McNichols* v. *Pease*, in the "appropriate" manner therein clearly indicated, was ordered removed to Massachusetts. *McNichols* v. *Pease* is so clear in support of the petitioner's position that it would appear needless to discuss other cases. And it should be considered that Morton, J., cited *McNichols* v. *Pease* when rendering his opinion in the Chung Kin Tow case, *supra*.

The respondent relies to a considerable extent on *Pettibone* v. *Nichols*, 203 U.S. 192. But that case supports the petitioner in his allegation that Putnam and Hale J.J., should have accorded hearings to the petitions presented to them.

The court at page 205 says: —

> "It is equally true that after the issuing of such warrant, before his deportation from Colorado, it was competent for a Court, Federal or State, sitting in that State to inquire whether he was, in fact, a fugitive from justice, and if found not to be, to discharge him from the custody of the Idaho agent and prevent his deportation from Colorado. *Robb* v. *Connolly*, 111 U.S. 624, 639; *Ex parte Reggel, supra*; *Hyatt* v. *Cork-*

ran, 188 U.S. 691, 719; *Munsey* v. *Clough*, 196 U.S. 364, 374. But it was not shown by proof before the Governor of Colorado that the petitioner alleged in the requisition papers to be a fugitive from justice, was not one, **nor was the jurisdiction of any court sitting in that State invoked to prevent his being taken out of that State and carried to Idaho."**

"In England, in the case of one arrested for the purpose of deporting him to another country, it is provided that there shall be no surrender of the accused to the demanding country until after the expiration of a specified time from the arrest during which period the prisoner has an opportunity to institute habeas corpus proceedings. *Extradition Act of* 1870, 33 *and* 34, *Vict. c.* 52, *No.* 11; *Butler on the Treaty-Making Power, No.* 436; 1 *Moore on Extradition*, 741, 742."

And *Ker* v. *Illinois*, 119 U.S. at p. 440, the court pointed out an exception to the rule would become operative if "some positive provision of the constitution or of the laws of the country were violated". The exact language of the court is as follows:—

"So here, when found within the jurisdiction of the State of Illinois and liable to answer for a crime against the laws of that State, **unless there was some positive provision of the Constitution or of the laws of this country violated in bringing him into Court,** it is not easy to see how he can say that he is there 'without due process of law,' within the meaning of the constitutional provision."

It is pertinent to call attention to the warning given by McKenna, J., in his dissenting opinion in the Ker case, wherein he said:—

"The foundation of extradition between the States is that the accused should be a fugitive from justice from the demanding State, and he may challenge the fact by habeas corpus immediately upon his arrest. If he refute the fact he cannot be removed. *Hyatt* v. *Corkran*, 188 U.S. 691. And the right to resist removal is not the right of asylum. To call it so in the State where the accused is is misleading. It is the right to be free from molestation. It is the right of personal liberty in its most complete sense. And this right was vindicated in *Hyatt* v. *Corkran*, and the fiction of a constructive presence in a State and a constructive flight from a constructive presence rejected. **This decision illustrates at once the value of the means to enforce the right. It is to be hoped that our criminal jurisprudence will not need for its efficient administration the destruction of either the right or the means to enforce it. The decision in the case at bar, as I view it, brings us perilously near both results.**"

HEARING BEFORE U. S. COMMISSIONER AND ITS RELATION TO DENIAL OF DUE PROCESS OF LAW.

The denial of due process of law, emanating from the acts of Putnam and Hale, JJ., was not restricted solely to refusing consideration to habeas corpus petitions. The petition presented to Morton, J., alleged that the U. S. Commissioner at Bangor, Me., before whom the petitioner was first arraigned, had not permitted the petitioner a fair hearing. Morton, J., without according the petitioner a hearing upon the merits of the petition, which would have enabled the petitioner to present such evidence and arguments of law as were essential and applicable thereto,

sought to pass upon the sufficiency and force of the allegations which represented that the offence for which the petitioner was indicted in Massachusetts was part of an act of war and inseparable from the culmination of the act, viz., destruction on British soil of the international bridge. (For discussion of the sufficiency of the demurrer, also of act of war as presented by evidence before the commissioner, see that part of argument pertaining to 10th, 11th, 12th and 13th errors.)

Morton, J., in refusing to review or correct the judicial proceedings in Maine (R. p. 21), ruled that he "ought not to go behind the order of removal". That is his explanation for declining to review the acts of his colleagues of the Maine jurisdiction, involving, as was urged by the petitioner, a ruling on the right of the two judges of the Maine jurisdiction to refuse consideration to habeas corpus petitions. Morton, J., to be consistent, should have stopped at the point where he refused a review of what transpired in Maine. The petition before Morton, J., in its entirety, was built upon allegations of erroneous acts in the Maine jurisdiction:

(*a*) Acts of Putnam and Hale, JJ.

(*b*) Acts and rulings of the U. S. Commissioner.

An examination of the petition presented to Morton, J. (R. pp. 2–15) will disclose that paragraphs one to twenty-four, inclusive, contain a recitation of all that transpired up to the time when the petitioner was committed into the custody of the respondent by order of Morton, J. (R. p. 12). The remainder of the paragraphs attack the order of commitment as null and void for the reasons as instanced in the following summary:—

Paragraph 25: Refusal by U. S. Commissioner to receive certain evidence.

Paragraph 26: Refusal by U.S. Commissioner to entertain special plea contesting jurisdidtion.

Paragraph 27: Refusal of U.S. attorneys to produce before U.S. Commissioner papers, documents and articles, taken from the prisoner by agents of the Department of Justice, and essential to establishing his defense and obtaining a fair trial.

Paragraph 28: Refusal of the clerk of the U.S. District Court for Maine to receive and enter the habeas corpus petition presented prior to the issue of order of removal.

Paragraph 29: Acts of Putnam, J.

Paragraph 30: Acts of Hale, J.

Paragraph 31: Acts of Putnam and Hale, J.J.

Paragraph 32: Irregularities of the proceedings in Maine.

Paragraph 33: Acts of Putnam and Hale, J.J.

Paragraph 34: Denial in Maine of rights guaranteed by U.S. Constitution.

Paragraph 35: Amendment setting forth domicile.

The petition was confined narrowly to denial of due process of law within the Maine jurisdiction. The demurrer filed by the respondent (R. p. 15) was specifically built around the effort to establish that due process of law had not been denied the petitioner.

The only hearing before Morton, J., was a discussion of law on the sufficiency of a demurrer when the petition represented—

(1) Violation of the U. S. Constitution.

(2) Violation of the U. S. laws.

(3) Violation of treaty rights.

(4) Denial of a fair hearing to one representing himself to be a subject and citizen of a foreign state and domiciled therein and held in custody for an act

done under his right, title, authority, privilege, protection and exemption, claimed by force of his commission as a military officer.

(5) Denial of the right to establish that offence for which the prisoner was in custody was an act of war, recognizable only by the law of nations.

(6) Denial of right to enter in court a habeas corpus petition.

(7) Denial by two U. S. judges to accord a hearing or any consideration to habeas corpus petitions.

(8) And other sufficient causes for according a full and fair hearing before the court over which Morton, J., presided.

Neither by the petition or the demurrer was Morton, J., confronted with the question of considering the sufficiency of the indictment, or determining if the offense charged against the petitioner constituted an act of war.

The office of the demurrer was to determine one point only, viz., was the petition broad enough to entitle the petitioner to a hearing on the merits of his allegations, to the end that he would be accorded due process of law. The petitioner cannot understand why Morton, J., should dispose of issues of law and facts not before him in the petition, and refused to consider the acts of Putnam and Hale, J. J., or the acts of the U. S. Commissioner at Bangor, Maine, which were before him.

Returning to the direct question involved: did the Circuit Court of Appeals commit error in affirming the ruling of Morton, J., viz.: "It is not the business of this Court to revise or correct judicial proceedings in the District of Maine", it is found that by virtue of Revised Statutes, Sec. 751, the Supreme Court and the Circuit and District Courts shall have power to issue writs of habeas corpus

and Sec. 752 then empowers the several judges of the courts to grant such writs.

Judge Morton was therefore sitting as the District Court in the hearing upon this petition.

Revised Statutes, Sec. 1014, provides for the arrest, imprisonment and bail of offenders and vests certain limited powers and duties relative thereto in certain officials judicial and executive named therein, some of whom rank higher in office than a district judge. The acts of these officials are not the acts a court described in Sec. 751, *supra,* but merely the acts of individual magistrates and as such their jurisdiction cannot be co-ordinate with the jurisdiction of the District Court, but must be inferior thereto.

The judicial tribunals of the United States Government have exclusive authority to determine whether a person held in custody by authority of the U. S. courts, its commissioner or officers are held in conformity with law.

Robb v. *Connolly,* 111 U. S. 624, 639.

In view of the statute vesting the power to issue habeas corpus in the United States courts of co-ordinate jurisdiction depending in part for its exercise, by either of said courts, on the prisoner's place of unlawful restraint, it would nullify the object and virtue of the writ if one court without jurisdiction of a criminal cause in fact, but under color of it, could oust itself of habeas corpus jurisdiction in removing a prisoner by warrant from before itself and to within the place of another and different court of co-ordinate jurisdiction; the latter court could then set up the co-ordinate powers of the first court as a bar to reviewing such illegal jurisdiction.

Such a doctrine has not received general, if any, approval in the U. S. courts where jurisdictional question

was involved; and cases subsequently reviewed in this brief fail to discuss it. (See Frank's case, 237 U. S. 309.)

The case of *U. S.* v. *Shepherd*, 1 Abbott, U.S. Rep. 431, cited by Morton, J., in no way supports his position, but is analogous in principle to the point here involved; this case says: —

> "When it is alleged that there was no showing supported by oath or affirmation, and the illegality of the warrant is made the basis for arresting all further proceedings in the cause, it is our duty to inquire whether the fact is as asserted."

When a court or judge had authority to issue a writ of habeas corpus or a certiorari to remove a cause and the record of it from an inferior court to be tried before them, or where they acted as superior committing magistrates, they might go back into the evidence on which the commitment was founded, and review that, because of their jurisdiction over the inferior courts and their acts, and because of their general superiority.

> Church on Habeas Corpus, 2d Edition, p. 323, and cases cited.

The District Court of Massachusetts would therefore have a perfect right to review the illegal orders of the magistrates named in Section 1014, and to go behind the record when the allegations of the petition directly attack the jurisdiction to issue the process by which he was removed and is held.

The warrant of arrest, although regular on its face, is not necessarily conclusive evidence that the prisoner is rightfully deprived of his liberty and its regularity may be inquired into.

> *Wales* v. *Whitney*, 114 U.S. 564.
> *Ex parte Jenkins*, 2 Wall, Jr., 521, 528.
> *McNichols* v. *Pease*, 207 U.S. at p. 109.

The court may inquire as to whether the magistrate has exceeded his jurisdiction and whether he had any legal or competent evidence of facts before him, or whether to exercise his judgment as to the criminality of the accused.

Church on Habeas Corpus, 2d Edition, p. 321, and cases cited.

On habeas corpus the proceedings of a special tribunal may be inquired into so far as to ascertain whether it has kept within the line of its authority and of its statutory powers.

Church on Habeas Corpus, Note p. 320.

When the prisoner is detained by virtue of any process civil or criminal issued by any officer in the course of judicial proceedings before him, authorized by law, and the process is regular, and valid upon its face, the presumption will be in favor of the legality of such imprisonment; and the burden of impeaching its legality will be thrown upon the prisoner; he may show in this respect:

"That the jurisdiction of such Court or officer has been exceeded; or that he has been committed without reasonable or probable cause."

Church on Habeas Corpus, 2d Edition, Sec. 236, and cases cited.

The court may always inquire into the jurisdiction of the committing officer.

Am. and Eng. Enc. of Law, 2d Edition, volume 15, p. 198, and cases cited.

In many States the sufficiency of evidence before the committing magistrate is reviewable.

Am. and Eng. Enc. of Law, *supra*, p. 200.

Your appellant contends that at all stages of the pro-

ceedings in Maine he denied the jurisdiction of the tribunals over his person.

PROCEEDINGS IN MAINE.

The following facts of the proceedings in Maine are alleged in the petition for habeas corpus heard by Morton, J.:—

1. A special plea to the commissioners' jurisdiction was filed by your appellant.

2. That all the evidence which the United States Government offered was a copy of the indictment and warrant with the Marshal's return and rested (R. p. 8).

3. The petitioner then admitted that he was the Werner Horn mentioned in said indictment and complaint (R. p. 5).

4. The petitioner then submitted an affidavit containing evidence in support of his special plea, as well as making oral offers of proof, that he was a subject and citizen of the German Empire and domiciled therein, and was being held in custody for an act done under a right, title, authority, privilege, protection and exemption of his commission as an officer in the German Army or under color thereof, the validity and effect whereof depended upon the law of nations (R. p. 5). That certain property material to a proof of these facts was forcibly seized by the United States officials (R. p. 5). The plea was not traversed, nor the facts contradicted (R. p. 5).

5. Part of the evidence was received and part was excluded by the Commissioner (R. p. 7), who overruled the plea and made an order committing your appellant to the custody of the Marshal in lieu of furnishing bail for his appearance at the District Court of Maine (R. p. 9).

Revised Statutes, Sec. 753, provides when the writ of habeas corpus shall issue (R. p. 20).

Your appellant contends that these allegations of facts brought his acts within the purview of Revised Statutes,

Section 753, so far as it relates to a foreign citizen, and that the establishment of these facts *ipso facto* deprived the Government of the United States and its judicial departments of any jurisdiction over your appellant's person in the prosecution of this alleged offense.

The language of this section is so particular and exhaustive, in respect of the right to habeas corpus, as to substantially imply "that when the validity of the act depended upon the law of nations" the laws of the State or the United States were superseded in such a case, and had no application. Consequently in determining the identity of the accused the commissioner was confronted with facts which denied his jurisdiction over the person of the accused. And the commissioner's jurisdiction is unquestionably a matter for review on habeas corpus.

Cases *supra.*

WEBSTER'S OPINION IN RE McLEOD CASE.

This exhaustive opinion of Cowen, J., in *People* v. *McLeod*, 25 Wendell, 483–586, proceeded on the same theory as that of Morton, J., in this case, and far from "not being seriously doubted", it aroused a nation-wide protest among the bench, bar and people, which found expression in Section 753, Revised Statutes. The opinion of Daniel Webster best states the judgment generally voiced. Webster said: —

> "Well, sir, McLeod's case went on in the court of New York and I was utterly surprised at the decision of that court on the habeas corpus. On the peril and at the risk of my professional reputation, I now say, that the opinion of the court of New York in that case is not a respectable opinion, either on account of the result at which it arrives, or the reasoning on which it proceeds."
>
> Works of Daniel Webster, Vol. 5, p. 129.

Webster had been Secretary of State during the time McLeod's case was pending in the New York State courts, and intimately familiar with all the principles of International Law involved. He was not alone in the opinion expressed above. It was shared and voiced by such leaders of the American bar, of that period, as Rufus Choate, U. S. Senator Jno. MacPherson, of Georgia; U. S. Senator J. W. Huntington, of Connecticut; U. S. Senator Thomas Clayton, of Delaware, and U. S. Senator J. J. Crittenden, of Kentucky; Chancellor James Kent; Gibson, C. J., of the Pennsylvania Supreme Court; Professor Simon Greenleaf, of the Harvard Law School, and Theron B. Metcalf, Reporter of Decisions, Mass.

EXCLUSION OF EVIDENCE.

The Commissioner went further, however, and excluded evidence offered in support of these allegations.

In *U. S.* v. *Almeda* (U. S. Cir. Ct.), 2 Wheel. Crim. (N. Y.) 570, the Court says: —

> **"Every freeman has a right to demand the enjoyment of proving his innocence simultaneous with the first step of the prosecution."**
>
> *Hastings Case*, 219 Fed. Rep. 83.

The Commissioner's act was a violation of the Constitution, which guarantees the citizen due process of law and his order of commitment based only upon the presentation of the indictment, when other evidence overcoming or tending to overcome its prima facie value was excluded, was void. (*Tinsley* v. *Treat*, 205 U. S. 20.)

Judge Putnam as the Judge of the District Court was the proper judicial officer to whom a petition for habeas corpus could be presented, and in view of the allegation of fact made in the petition it was his bounden duty to entertain the petition. (Revised Stat., Sec. 751–753.)

Furthermore the evidence received and excluded by the Commissioner, constituted a prohibition of the Commissioner's jurisdiction, and if true, Judge Putnam could acquire no jurisdiction to issue a warrant of removal.

Judge Lowell, in *U. S.* v. *Pope*, Fed. Cas. 16,059 (1878), said:—

> "The mode adopted to procure the attendance of a defendant, found out of the district where the offense is said to have been committed, is to apply to a commissioner or judge under the Judiciary Act, s. 33 (1 Stat. 91), now re-enacted in Rev. St. s. 1014, and produce before him the evidence of criminality precisely as if the defendant's crime was alleged to have been committed within the district. . . . The usual course is to produce either witnesses or affidavits in behalf of the United States. It has been seriously doubted whether a copy of an indictment is evidence in such an examination. I decided in Alexander's case . . . that it is. This was a very convenient decision for the United States and a sound one, but it rests rather on long usage than on any principle of law, because, generally speaking, an indictment is evidence of nothing but its own existence, unless there is some statute giving it a greater effect. It is but secondary evidence after all, or rather a statement of the result of evidence, and the better practice is to give primary evidence, of criminality. . . . Congress not having seen fit to authorize a bench warrant to issue out of the court in which the indictment is found, it becomes the duty of the magistrate to examine the evidence carefully as in any domestic case."

MANDATORY TO ACCORD HORN A FULL HEARING.

The decision of the Circuit Court of Appeals for this district in the case of *Hastings* v. *Murchie*, 219 Fed. Rep. 83, made it mandatory to accord Horn a full hearing. The two basic facts controlling the ruling of Putnam, J., were: First, that an indictment had been returned in the Massachusetts jurisdiction; second, that the U. S. Commissioner at Bangor found probable cause. But Horn had alleged the act for which he stood charged was punishable only by the law of nations and was not criminal in itself, therefore the Massachusetts indictment was not enforcible; also that the U. S. Commissioner had deprived him of a fair trial by refusing to permit the introduction of evidence sustaining that defence. In the Hastings case the opinion as delivered by Bingham, J., is:—

> "As the case stands there was evidence from which the Commissioner could find probable cause for the commitment and detention of the appellant. Whether this evidence would have been overcome, had the appellant been permitted to introduce the evidence which he offered before the Commissioner is entirely problematical; but if he is afforded an opportunity to present the evidence, either before the Commissioner or before the District Judge on application for removal, his rights will be fully preserved." (Judge Putnam dissenting from the opinion.)

JURISDICTION AT ISSUE.

Putnam, J., should have examined into the question of jurisdiction and determined by hearing of the habeas corpus petition whether or not the U. S. Commissioner had jurisdiction and was in error in excluding evidence bearing upon the issue of probable cause.

See also:—

U. S. v. *Pope*, Fed. Cas. No. 16,069.
Greene v. *Henkel*, 183 U. S. 249.
Beavers v. *Henkel*, 194 U. S. 73.
Tinsley v. *Treat*, 205 U. S. 20.
Haas v. *Henkel*, 216 U. S. 462.
Price v. *Henkel*, 216 U. S. 488.

The case of *Tinsley* v. *Treat* clearly points out the error of Morton, J., in ruling that the habeas corpus petition which is the subject of this appeal did not state any cause upon which the issuance of the writ could be based (R. p. 21). Putnam, J., was bound to act in accordance with the ruling of the Supreme Court, which in *Tinsley* v. *Treat* said:—

> "(In issuing a warrant under Section 1014) the judge exercises something more than a mere ministerial function involving no judicial discretion. He must look into the indictment to ascertain whether an offense against the United States is charged, find whether there was probable cause, and determine whether the Court to which the accused is sought to be removed has jurisdiction of the same."

INDICTMENT NOT CONCLUSIVE.

It was also held in this case that the indictment was not conclusive; that evidence tending to show that no offense triable in the district to which removal was sought had been committed by the accused in that district should be received; and that to decline to receive it involved the denial of a right secured by statute under the Constitution.

Also in that case the appellee contended that the excluded evidence was immaterial. The court said:—

> "If the indictment is only *prima facie*, then evi-

dence tending to show that no offense triable in the Middle District of Tennessee had been committed by defendant in that district could not be regarded as immaterial. . . . Nor can the exclusion of evidence offered be treated as mere error, inasmuch as the ruling involved the denial of a right secured by statute and the Constitution."

ENTRY REFUSED BY DIRECTION OF PUTNAM, J.

SEVENTH ERROR. **In not ruling specifically whether or not a petition for habeas corpus seasonably presented can be refused entry in court by order of a judge of a United States Court.**

The petition as before Morton, J., recited (R. pp. 9, 10) that Putnam, J., had ordered the clerk of the Maine District Court not to accept the petition when presented.

From what source does a United States Judge derive power to order the clerk of a District Court, where the aforesaid judge is presiding, to refuse to receive for entry a petition for the issuance of the writ of habeas corpus?

The statutes do not grant the power, and it does not spring from decisions of this Court. Plainly, then, it is usurpation of a power that has not existed, and should never exist. The attempt to give it effect is of momentous importance. It is fundamental that the courts of the United States are open to all who believe they have reasonable cause to appeal to the law for an adjudication. There is no power vested in a judge to direct the clerk, who is the agent of the court, to shut the doors of the court when an applicant for legal process, seasonably and in accordance with the laws of the land, appears and asks consideration.

OPINION OF MARSHALL, C. J.

Marshall, C. J., in *Cohens* v. *Virginia,* 6 Wheaton, 264, 404, said: —

> "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."

Champlin, C. J., in 79 Mich. 332, reviewing the act of a Circuit Court judge who ordered a civil action struck from the docket on the ground that the court in its discretion could refuse to take jurisdiction, said: —

> "If a party has a right to plant his suit in a Circuit Court of this State, a Circuit Court Judge has no discretion to exercise in the matter; he cannot say to one suitor, 'I will retain your suit', and to another, 'I will dismiss it.' It is among the fundamental rights of a people under our government that they may be secured in acquirement, possession and enjoyment of property, and for this purpose Courts are instituted as a part of the organic law in which every person shall have his remedy by due process of law."

Rawle on the Constitution, Chapter 21, page 199, says: —

> "If that government can truly be said to be despotic and intolerable in which the law is vague and uncertain, it can but be rendered still more oppressive and more mischievous when the actual administration of justice is dependent upon caprice or favor, upon the will of rulers, or the influence of popularity. When power becomes right, it is of little consequence, whether decisions rest upon corruption or

weakness, upon the accidents of chance or upon deliberate wrong."

Putnam, J., must be viewed as believing he enjoyed inherent judicial power to direct the clerk not to receive the petition. The doctrine of such power is dealt with at length and with clearness by White, C. J., in the recently decided case of *Ex parte United States* (October Term, 1915), in which the opinion was handed down as of date of December 4, 1916. The reasoning of this Court as expressed by the Chief Justice is applicable to the act of Putnam, J. The concluding sentence of the section treating of inherent judicial power is as follows: —

> " And thus it would come to pass that the possession by the judicial department of power to permanently refuse to enforce a law would result in the destruction of the conceded powers of the other departments and hence leave no law to be enforced."

Could there be a more striking instance of denial of due process of law than is embodied in the act of Putnam, J.? The facts were recited in the petition presented to Morton, J. (R. pp. 9, 10). Morton, J., ruled the petition on its face did not state a cause for relief. The Circuit Court, though the error of Morton, J., was before it (see Assignment of Errors, p. 32), ruled that it appeared from the petition itself that the petitioner was not entitled to the writ (R. p. 35); and again (R. p. 30) classified the act of Putnam, J., as "immaterial". The petitioner contends the Circuit Court erred as outlined in the seventh error.

EIGHTH ERROR. **In not ruling specifically whether or not a petition for habeas corpus seasonably presented can be refused any consideration whatsoever by a U. S. judge or judges.**

Discussion of this error is covered by the discussion of

the 4th, 5th, 6th and 7th errors. The assignment of errors on the part of Morton, J., as presented to the Circuit Court of Appeals called for a ruling that would be specific in its treatment of the right of a judge to refuse any consideration to a habeas corpus petition (R. p. 22, Errors 6th, 7th, 14th).

NINTH ERROR. **In not ruling whether or not Morton, J., was in error in finding as follows:—**

> "From the allegations in the petition, it is clear that all formalities required by law in connection with the order of removal were observed."

The substance of this error is also included in the discussion of the 4th, 5th, 6th and 7th errors. The assignment of errors on the part of Morton, J., included the following:—

> "Fourth: The Court erred in finding that all formalities required by law for the removal of the petitioner from Maine to Massachusetts had been observed."

The Circuit Court opinion contains no reference to the aforesaid fourth error of Morton, J. The nearest approach to a reference is the first sentence of the second-last paragraph (R. p. 30), which in effect dismisses the error as immaterial. The petitioner contends that it is material (and not "immaterial") that due process of law was denied. He was justly entitled to a ruling from the Circuit Court of Appeals specifically approving or overruling Morton, J.

TENTH ERROR. **In not ruling that Morton, J., was in error in not according the petitioner a hearing upon the actual facts, at which hearing the petitioner would have opportunity to establish whether upon the representations contained in his petition and evidence directly related**

thereto he would be entitled to a writ of habeas corpus or such other relief as the court after a full hearing would deem just and warranted.

This error, together with the 5th and 6th errors, directly pertain to the ruling of Morton, J., sustaining the demurrer of the respondent. The Circuit Court ruled:—

> "In proceeding to consider and determine whether, upon the facts presented in the petition, the prisoner, if brought before the Court, would be discharged, the learned District Judge followed an approved course, and did not in this respect deny to the petitioner any right secured him by Section 753 of the Revised Statutes. *Frank* v. *Mangum*, 237 U.S. 309, 332; *Ex-parte Milligan*, 4 Wall. 2, 110, 111."

The petitioner urges a close analysis of the position that Morton, J., took in using a principle of law to support his position which plainly does not fit the facts.

Morton, J., ruled that he had no power to revise or correct the judicial proceedings in the District of Maine (R. p. 21). By that ruling he avoided passing upon the several questions of denial of due process of law involved in the acts of Putnam and Hale, JJ., and the U.S. Commissioner.

FRANK CASE DOES NOT SUPPORT RULING OF CIRCUIT COURT.

Can it be urged that if Morton, J., concluded that the law of the land required he should pass upon those questions of the denial by due process of law, he would have found anything in the Frank case (*supra*), or the Milligan case (*supra*), to support his position that the petition before him did not state facts which, if true, entitled the petitioner to relief?

How could Morton, J., apply the Frank case (*supra*) to

the case at bar, subsequent to throwing out of the petition all facts dealing with denial of due process of law by Hale and Putnam, J.J., and the U.S. Commissioner?

There was nothing left to fit the demurrer to, in the sense that Morton, J., used it, viz., what constituted an act of war and the sufficiency of the indictment. (See discussion pp. 34, 35 of this brief for analysis of relief sought by the petition.) The two questions are without proper foundation and are introduced by Morton, J., to give application to the doctrine for which he cites the Frank case (*supra*) and the Milliken case (*supra*).

The Circuit Court also relied upon *Frank* v. *Mangum*. It is in order, therefore, to distinguish as between the latter case and the one at bar. That portion of the decision in the Frank case found at page 332 is separated by the ruling of the Circuit Court from the context. The test as applied by this Court is embodied in the plain meaning of the words: "It was the duty of the Court to refuse the writ if it appeared from the petition itself that appellant was not entitled to it." The court used that sentence purely in an academic sense, as pointing out a course, among others, that was open to the district judge. But emphasis is placed upon the point that it must be clearly apparent, upon a review of all the facts contained in the allegations of the writ, that due process of law had not been denied the petitioner.

Before having expressed itself in the words just quoted, this Court had carefully summarized the controlling principles emanating from habeas corpus, and in the paragraph just preceding that in which is found the sentence cited by the Circuit Court in support of the ruling of Morton, J., is the following: —

> "In the light, then, of these established rules and principles: that the due process of law guaranteed by

the 14th Amendment has regard to substance of right, and not to matters of form or procedure; that it is open to the courts of the United States upon an application for a writ of habeas corpus to look beyond forms and inquire into the very substance of the matter, to the extent of deciding whether the prisoner has been deprived of his liberty without due process of law, and for this purpose to inquire into jurisdictional facts, whether they appear upon the record or not; that an investigation into the case of a prisoner held in custody by a state on conviction of a criminal offense must be taken into consideration the entire course of proceedings in the courts of the state, and (332) not merely a single step in those proceedings; and that it is incumbent upon the prisoner to set forth in his application a sworn statement of the facts concerning his detention and by virtue of what claim or authority he is detained, — we proceed to consider the questions presented."

FUNDAMENTAL PRINCIPLES DISREGARDED.

Morton, J., in eliminating all allegations dealing with the acts of Putnam and Hale, JJ., and U. S. Commissioner Reid, disregarded the plain direction of this Court in respect to the fundamental principles enumerated by Pitney, J. Those principles which were denied consideration when Morton, J., construed as the "face of the petition" the remnants of what was left when he finished cutting out all that directly raised the question of denial of due process of law in Maine are as follows: —

(*a*) The substance of right.

(*b*) The duty to look beyond forms and inquire into the very substance of the matter, to the extent of deciding whether the prisoner has been deprived of his liberty without due process of law.

(*c*) Inquiry into jurisdictional facts.

(*d*) Investigation that would include the entire course of proceedings, not merely a single step.

And this Court, in the paragraph immediately following the sentence used by the Circuit Court, said (p. 332 of Frank case): —

> "Now the obligation resting upon us, as upon the District Court, to look through the form and into the very heart and substance of the matter, applies as well to the averments of the petition as to the proceedings which the petitioner attacks. We must regard not any single clause or paragraph, but the entire petition, and the exhibits that are made part of it."

Morton, J., did exactly the opposite to that which this Court directed as the fundamental prerequisites. To reconstruct the "face of the petition", in a manner that would support his ruling that the demurrer was well pleaded, instead of looking "through the form and into the very substance of the matter", he cut out "the very substance" and drew to his support the erroneous view bearing upon the form, viz., the form of the removal warrant prevented a review of the alleged acts in the Maine jurisdiction. And the Circuit Court went a step further in the opposite direction to that which this Court said was the right course. The Circuit Court said it was "immaterial" whether due process of law was denied the petitioner (R. p. 30).

Though this Court said: "We must regard not any single clause or paragraph, but the entire petition, and the exhibits that are made a part of it." The decision of Morton, J., embodied an exclusion of all that transpired in Maine, a course plainly at variance with the basic princi-

ple of the Frank case. It was explained at length and in precise words by Pitney, J., that the district judge who considered the Frank petition upon its face had reviewed the entire proceedings of the Georgia courts. And it was also made clear that if at any stage of the proceedings before the Georgia courts there had been any instance of denial of due process of law, the district judge would have been compelled to accord a hearing and relief. It is difficult to comprehend how Morton, J., as well as the Circuit Court of Appeals, can find support from the Frank case in ruling that the Horn petition could be considered upon its face when there has been an arbitrary barrier created by them preventing any review of all that transpired in Maine.

Ex parte Milligan (*supra*), cited by the Circuit Court, in support of Morton, J., when viewed in the light of the complete opinion, is not applicable to the case at bar in point of refusing a hearing. Milligan was afforded relief, this Court having determined that his petition established that due process of law had been denied him. The opinion as a whole supports the contention of the petitioner at bar, viz., that he was entitled to a hearing.

For the foregoing and other reasons as stated in the discussion of other errors previously considered it follows that the Circuit Court erred in not ruling that Morton, J., was in error in refusing to accord the petitioner a hearing upon the facts as alleged in his petition.

CIRCUIT COURT'S RULING THAT ALLEGATIONS IN PETITION ARE INSUFFICIENT IS ERROR.

It seems clear that the statutes relating to habeas corpus do not contemplate a hearing upon the merits of the case when an application is made for the writ. Provision is particularly made for such a hearing upon the merits. It would seem sufficient if the petition is in proper form,

alleging a cause stated in the statute and supported by such allegations of fact as would merely negative any belief that it was frivolous. It would be absurd to expect the petitioner to submit all proofs of his contention with such application, and yet the argument of the United States Attorney, and apparently concurred in by the Circuit Court, proceeds upon the assumption that all proofs were before the Court and that the merits of the petitioner's contentions are thus in issue. (See last clause of Circuit Court opinion, R. p. 31.) So far as the petition attempts to elaborate the reasons assigned for the granting of habeas corpus it is urged that they are far from conclusions of law, but so far as the decisions against the petitioner urge the insufficiency of the reasons assigned they are exacting proofs essential only to a trial upon the merits if essential at all.

ALLEGATIONS OF AUTHORITY OR AVOWAL OF ACTS NOT INTENDED BY STATUTE.

The statement in the opinion of the Circuit Court "that no allegation is made that Horn did blow up the bridge in Canada", so that the argument of counsel as to its "inseparable connection" with the transportation of explosives can have any weight, overlooks the statement amounting to admissions of the fact, in the record (R. pp. 5, 6). Furthermore, "the court says there was no allegation that what Horn did was specifically authorized or avowed by the appellant's government". The court overlooks the alleged cumulative reasons in section 753 of R. S. pleaded in this connection, which it would seem in no way necessitate allegation of such facts.

> "An act done under any *alleged* right, privilege, protection, or exemption *claimed* under the commission, etc., of a foreign state or under color thereof, etc.",

calls for no such specific allegation of authority or avowal. And the opinion of the Circuit Court substantially rests upon these failures to plead as pointed out.

CIRCUIT COURT'S RULING THAT REFUSAL TO CONSIDER APPLICATION IN MAINE IMMATERIAL IS ERROR.

The Circuit Court of Appeals (in deciding that the refusal to consider a petition for habeas corpus in Maine became immaterial) by its decision that the present petition is to the same "unmeritorious effect", fails to observe the petitioner's contention that the acts of Putnam and Hale, JJ., constituted "a denial of due process of law", part of which was the refusal to admit evidence and proofs before the Commissioner which if allowed and passed upon judicially, as well as other proofs available only upon a hearing of the merits, would as he contends establish the "meritorious" effect of his petition. The court misapprehends its position. It is deciding the merits without according the petitioner a hearing upon the merits. Furthermore, a precedent is being established by their decision of "immateriality" rendering nugatory the mandatory provisions relating to habeas corpus as well as sanctioning a procedure in defiance of bounden judicial duty.

Section 755 says the court, etc., "shall award the writ", unless, etc. This section is mandatory, subject only to the exception stated. Putnam, J., refused to hear even the application for the writ.

A fair interpretation of Section 755 aside from the bounden duty imposed upon the jurist implies that a hearing is mandatory. If it is mandatory to award the writ upon a proper application, it perforce must be mandatory upon the court to receive the application. If such a refusal of duty can be treated as immaterial in a subse-

quent hearing upon the application for habeas alleging it as a "denial of due process of law", then such a refusal can well be indulged in as a practice, and a prisoner's rights postponed indefinitely; such refusals only awaiting their sanction finally when some official appointed to act finally chooses to act, whereupon the previous "refusals" to act become "immaterial". Such a doctrine might well nullify the virtue of mandamus. Such a doctrine practically treats the duty upon an application for habeas as "discretionary".

EVENTS IN MAINE IGNORED BY CIRCUIT COURT.

The Circuit Court overlooks the fact that a similar petition when presented to Putnam, J., in Maine also alleged the exclusion of evidence before the Commissioner, pertaining to his plea that he was not subject to the laws of the United States on the grounds now alleged in this petition.

The right to present such evidence seems plain. See — *Hastings* v. *Murchie*, 219 Fed. Rep. 83, which in substance says whether it would have been sufficient if fully admitted is problematical. And on the ground of a "denial of due process of law", this case alone supports the petitioner's right to habeas corpus in Maine, where the application for it was refused even consideration, as well as in Massachusetts, where his application was heard for the first time. But the refusal by Putnam, J., in Maine to act is again a denial of due process of law.

DENIAL OF DUE PROCESS OF LAW.

That a judicial refusal to act upon an application for habeas corpus is a "denial of due process of law", is an unusual contention merely because it arises from extraordinary judicial conduct rarely, if ever, indulged in by our judicial officers. No remedy is provided to meet it except

mandamus, which of course would be futile when issuing from the same source as habeas corpus. It would be an absurd necessity, if it were not impossible, for the petitioner to seek mandamus from the Court (or judge) creating the occasion for it. This is especially true in the present case, where the rapidity of events deprived the petitioner of recourse to such a proceeding even if he could have instituted one in any other manner in the jurisdiction from which he was so hastily removed. That such a remedy was not open to him is plain. No appeal is provided because *no hearing has been granted* from the decision upon which an appeal is provided.

That the writ is a " process of law " seems fundamental.

Resorting, however, to the definition of " due process of law " we find: —

> " A law which hears before it condemns.
>
> " Which proceeds upon inquiry and renders judgment only after trial. Law in its regular course of administration through courts of justice."
>
> See generally definitions and cases in Cyc. Vol. 8, p. 1081.

The writ of habeas corpus is designed as a process to institute proceedings whereby a prisoner can be released from an unlawful custody under the color of authority.

See dissenting opinion, McKenna, J., in —

> *Kerr* v. *Illinois, supra;*
> *Ex parte Milligan,* 4 Wallace, 2.

The refusal to hear an application therefor perpetuates the imprisonment and deprives the prisoner of the benefits and rights calculated to result from such a proceeding. The writ and proceeding must be a process of law considering its purpose and a refusal to consider an application for it a " denial " of such process.

WARRANT OF REMOVAL VOID.

The denial of a due process of law designed to interpose between the unlawful restraint and its perpetuation must necessarily render void the processes which immediately perpetuate the restraint and imprisonment.

The exclusion by the Commissioner in Maine of the evidence (alluded to *supra*) being a denial of due process of law entitling your petitioner to habeas corpus, and the refusal to receive or consider an application in Maine, also a denial of due process of law, the warrant of removal issued by Putnam, J., after such refusal to act judicially on the petition seasonably presented to him, renders his warrant of removal void.

Hastings v. *Murchie*, 219 Fed. Rep.
U. S. v. *Almeda* (*supra*).
Tinsley v. *Treat*, 205 U. S. 20.
U. S. v. *Pope*, Fed. Cas. No. 16,069.
McNichols v. *Pease*, 207 U. S. 192.

ACT OF WAR.

ELEVENTH ERROR. **In not ruling that the petitioner was within Section 753 of the Revised Laws of the United States, viz. :—**

> "The writ of habeas corpus shall in no case extend to a prisoner in jail, unless . . . being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

TWELFTH ERROR. **In not ruling that, even in the absence of authorization and avowal by the petitioner's government, the petitioner can invoke the law of nations or his commission as a military officer of the German Empire in defense of his actions.**

THIRTEENTH ERROR. **In not ruling that the petitioner was denied a fair hearing before the United States Commissioner at Bangor, Maine, March 18, 1915.**

The three foregoing errors for the purpose of discussion can be treated as one.

As pointed out in the discussion of the tenth error, the petition presented to Morton, J., did not seek an interpretation of what constituted an act of war, except in respect to the rulings of Commissioner Reid at the Bangor hearing. The petitioner alleges that Commissioner Reid denied him due process of law. The habeas petitions presented to Putnam and Hale, JJ., set forth the erroneous rulings of the Commissioner and asked for relief that would compel a fair hearing by the aforesaid Commissioner.

Hastings v. *Murchie*, 219 Fed. Rep. 83.

Review by Morton, J., of what (so far as the petition set forth the facts) constituted an act of war was confined to the hearing before Commissioner Reid. The issue was linked inseparably with the irregularities in the Maine jurisdiction. Apart from the aforesaid irregularities, the issue was not before Morton, J. It was not open to him to deny jurisdiction over the denial of due process of law in Maine and then usurp jurisdiction for the purpose of reviewing the sufficiency of the indictment and the nature of an act of war, as a means of redrafting "the face of the petition".

Cohens v. *Virginia*, 6 Wheaton, 264, at p. 404.

Discussion of the 11th, 12th and 13th errors is therefore directed wholly to the rulings of the Commissioner, and in no sense as a question before Morton, J., unless joined with the acts of the Commissioner as well as those of Putnam and Hale, JJ.

DID THE ALLEGATION IN PETITION ASSERT COMMISSION OF ACTS THE VALIDITY AND EFFECT OF WHICH DEPENDS ON THE LAW OF NATIONS.

Attention is called to petitioner's affidavit (R. p. 5), which is not denied by the respondent.

Exhaustive research has failed to find any case in point wherein facts similar to the present were in any way considered. In fact we believe that since Congress added to this section of the Revised Statutes the latter part under which this petition is brought, viz., "or being a subject of a foreign state, etc. . . .", there has not arisen a single case that has been taken to a court where written decisions are recorded.

The wording of this section is rather clear and comprehensive. Congress evidently intended to make it impossible for our law courts to resort to petty distinctions or finely drawn differences in matters of this kind wherein questions concerning other nations and our own might be concerned. Congress brought within this section, not only expressly authorized and solemnly sanctioned acts, but also any act that could be alleged to be so done. Surely in this case Lieutenant Horn cannot be excluded from the operation of this law, because he actually claims he acted under the authority of his commission. This is his alleged right, and Congress did not intend that one invoking this section would have to go any further. Congress knew that after the writ was issued there was ample power in our government to secure amends or

prove or disprove the alleged action by the law of nations through our diplomatic channels.

"*Alleged*" means "claimed".

U. S. v. *Milner*, 36 Fed. 890, 891.

Allege in law really signifies that the petitioner asserts a thing which he will later prove, or, in other words, it is simply another way of saying that he pleads.

It was not necessary that Lieutenant Horn should specifically set ont that he was anthorized or commanded by the German government or that it has avowed its responsibility therefor, as Morton, J. (R. p. 20), asserts, which doctrine is approved by the Circuit Court of Appeals (R. p. 29).

Neither Morton, J., nor the Appellate Court had any power to curtail the limits of this section. At no place is it even intimated that the foreign nation for whose benefit the act is alleged to have been committed must expressly ratify or authorize or avow. The law was broadly written by men who knew what they were doing after the country had been subjected to the humiliating experience detailed in the McLeod case, 25 Wendell, p. 483, and the indignation of the American bar as expressed in 26 Wendell, page 663. The customs of nations and international practice does not disclose that foreign governments have any intercourse with our courts. The only medium is through our State Department, and Congress intended to make plain to prosecuting officials that they were not to meddle in matters that affected the welfare of the nation when the law was passed, but rather that they must leave the matter to the Department of State after a claim was made that it came under its jurisdiction.

Morton, J., exceeded his powers when he sought to read into the law something that Congress practically said was not even necessary when it used the words "under color

thereof". Could the intention of Congress been any more plainly set forth?

"*Color*" in law means not the thing itself, or the right of the thing, but only the appearance thereof.

Hendee v. *State*, 80 Neb. 80.

"*Color*" as used in Section 753 is really a term of pleading and means an apparent or prima facie right.

124 Ky. 65.

Color of authority as applied to a de facto officer means authority derived from an election or appointment however irregular or informal.

Kelley v. *McCormack*, 28 N. Y. 318, 321.
Kirchbaum, 221 Pa. 521.
Decker v. *Judson*, 16 N. Y. 439.
State v. *Ely*, 16 N. D. 569.
State v. *Oates*, 86 Wis. 634.

It means a semblance of authority, thereby distinguishing it from real authority.

City of Topeka v. *Dwyer*, 70 Kan. 244.

Color, — an apparent or prima facie right, pretext or ground; especially used in legal phraseology and commonly implying falsity or some defect of strict right: as to extort money under color of office: to hold possession under color of title.

See Century Dictionary.

"*Color of law*" does not mean actual law. Color as a modifier in legal parlance means appearance, as distinguished from reality. Color of law means mere semblance of legal right.

174 U. S. 168.

It is a technical expression, it implies bad faith, corruption, breach of duty.

Chamberlain v. *Bella*, 18 N. Y. 115, 117.
Mason v. *Crabtree*, 71 Ala. 471, 481.
Richardson v. *Crandall*, 58 N. Y. 348, 361.

The term "*color*" means semblance, show, pretence, appearance, and implies in the language of the law that the thing to which it is applied has no real character imputed to it.

See *C. R. I. P. R. R.* v. *Alfree*, 64 Iowa, 500.

WHAT ARE ACTS OF WAR?

If Lieutenant Horn's act was an act of war, it was of course subject only to the law of nations, and the writ of habeas corpus should have been issued as prayed for.

Acts cognizable by law of nations are necessarily free from liability to investigation, or rather to punishment, by the ordinary courts. In the case of the Roanoke, when the captors were taken up as pirates they produced a commission from Jefferson Davis as the authority under which they were acting. Did the court stop to question it? No. The judge stopped the examination, or rather the attorney-general did so; he said: —

> "This act was committed by one who produces the authority of his sovereign as his justification. His case, therefore, is no longer one which can be proceeded with as robbery, for which he is amenable individually to the ordinary courts."

The prisoners were thereupon discharged.

> "The moment an act becomes a national act — all private jurisdiction over it as regards individual responsibility ceases. The rule cannot be evaded by selecting from an act referable for its approval or

censure only to the law of nations, a portion of an incident in such act; and then attempt to subject such portion or such incident to trial by a municipal tribunal. The whole of the details and incidents, which, in the aggregate, constitute a national, or hostile act must be taken together. It was the hostile act or portion which must be looked at, and not each minute detail of the act."

Opinion Smith, J., St. Albans Case, p. 403.

Acts of war by the law of nations are just such acts as the belligerent chooses to commit within the territories of each other. These acts are done upon the responsibility of the nation, and the *soldiers* committing them cannot in any way be held responsible for them. The general and abstract rule undoubtedly is that every subject of one belligerent is the enemy of every subject of the other, and that one belligerent may lawfully kill his enemy, or seize upon his property wherever he finds him or it, except in neutral territory.

Lawrence's Principles of International Law, pp. 552–3, says: —

"The great judges who adorned the Supreme Court of the United States during the first quarter of the nineteenth century laid down again and again that the intent of the parties concerned in fitting out, arming and equipping in question should be the determining element in the decision."

Horn's contention, that he was within his rights as a belligerent in attempting on British soil to stop shipments of munitions of war, is sustained by various text-writers of note. Hall on International Law, at page 515, says: —

"The rights of offence and defence possessed by a belligerent community are exercised through the

instrumentality of armed forces, and by means of military and naval operations."

"But belligerent acts are also performed by bodies of men less formally organized, and the legal position of some of these is not yet so defined as to be in all cases clear."

And again, at page 531, it is said by Hall:—

"In a general sense a belligerent has a right to use all kinds of violence against the person and property of his enemy which may be necessary to bring the latter to terms. Prima facie therefore all forms of violence are permissible, but the qualification that the violence used shall be necessary violence has received a specific meaning; so that acts not only cease to be permitted as soon as it is shown that they are wanton, but when they are grossly disproportioned to the object to be attained; and the sense that certain classes of acts are of this character has led to the establishment of certain prohibitory usages."

Horn's alleged act was not wanton, and was executed in accordance with military principles. The authority of Horn is sufficiently established whether the authority was expressed or implied. See *St. Albans*, 460, citing Wheaton, pages 626, 627.

Halleck on International Law, at page 305, says:—

"Judge Story, in speaking of the seizure of an American vessel and cargo by a Spanish vessel, said, that if she had a commission, it was an act of the Spanish Government; and if she had no commission but the act was adopted and acknowledged by the Crown, or its competent authorities, the seizure must be considered as for the benefit of the Crown and

the property when condemned becomes a droit of the Government. This view of the question is supported by the opinions of Chancellor Kent, Chief Justice Spencer and Judge Talmage of New York; Chief Justice Gibson of Pennsylvania; Prof. Greenleaf of Harvard University, and numerous other distinguished jurists of the United States."

See *Carrington et al.* v. *C. Ins. Co.*, 8 Peters, 522.

Charles Lee, Atty. Gen. (see Opin. of Atty. Gen., Vol. I, p. 81), said:—

"If the cause of action is fully and truly stated in the memorial, Henry Sinclair, upon a plea to the jurisdiction of the Court ought to prevail before the Court; for it is as well settled in the United States as in Great Britain, that a person acting under a commission from the sovereign of a foreign nation is not amenable for what he does in pursuance of his commission to any judiciary tribunal in the United States."

Lawrence's Principles of International Law, pages 552, 553, says:—

"There can be no doubt that as a general rule the commission of a belligerent power exempts the ship which bears it from the proceedings against her in the ports of other States. The decision of Chief Justice Marshall in the case of the Exchange is decisive on this point. On proof that the vessel had been duly commissioned by Napoleon I, he declined to try in an American Court the legality of her original seizure by the French Government when she was owned by an American citizen and lay in a Spanish port. But the question whether this rule applies to vessels who have no recognized government behind

them to be responsible for their misdeeds, and applies so far as to shield them from executive action on the part of the State whose neutrality they have violated, was a new one when raised by the advocates of the United States in the Geneva Arbitration."

A comprehensive and forceful summary is set forth in Bishop on Criminal Law, 17th Ed. at page 132, wherein the distinguished and accepted authority says:—

"In principle, but perhaps not certainly on judicial authority, if a foreigner who is not a spy, or within the same reason, comes here during either peace or war by command of his sovereign, with whom in times of peace we maintain diplomatic relations, and upon our territory commits any wrong, our courts are not to pursue him as for a crime, but we are to look for redress solely to his sovereign. All admit this to be so, if the two nations are at war; but it must be so also while they are in other respects at peace. One reason is, that as the subject acted under compulsion from the highest earthly power above him, he should be permitted to set up this compulsion in excuse, on the ground of necessity,— a reason, however, which might not be quite conclusive alone. Another is, that, as in all crimes the government is the party offended, it should not seek a double redress, both of the immediate offender and of the sovereign who commanded him, but suffer the greater to absorb the less; for this is a widely different case from those ordinary ones in which the principal and his agents are alike punishable. But the controlling consideration is, that, if we first take our full redress, according to the measure which our law deems proper for the offence committed, out of the servant, we have no claim left to present to his mas-

ter; or, if we have, still such a proceeding would embarrass the settlement with the master. An immense public evil would thus be done; while the philosophy of the criminal law is, that no man shall receive punishment, however he may merit it, unless it will promote the public good."

Section 753 was clearly intended to cover violations of our territory by belligerents. In fact, this is about the only class of cases that part of the section contemplates.

Horn's action in attempting to destroy a bridge in territory of his country's enemy was an act of war done on behalf of his government and therefore a public act, and under the law of nations, members of one belligerent nation may destroy or capture property of other belligerent nations wherever found except in neutral territory.

See 3 Phillimore, pp. 115, 116, 120 (in notes 132, 7, 8 and 9, note 9).
Lee on Captures, p. 141.
Bynkershoeck, Chap. 4, p. 27.
3 Rutherford, p. 549.
Bas v. *Tingy*, 4 Wheaton, p. 40.
Miller v. *The Resolute*, 2 Dallas.
Lawrence, Wheaton, p. 518.
2 Rutherford, 18, 19.

By the provisions of the Declaration of London, 1909 (see Stockton — Appendix IV), the defendant Horn was justified in believing bridge was used for transporting munitions of war.

COMMISSION AS AN OFFICER SUFFICIENT AUTHORITY TO COMMIT ACT.

The possession of a commission by an officer of a belligerent army authorizes him to engage in every act of hostility against the other belligerent permissible under the law of nations.

1 Kent, pp. 94 and 96.
Halleck, p. 386.
Lawrence, Wheaton, pp. 626, 627.
1 Opinion Attorney General, pp. 46, 81.
26 Wendell, 675.
2 Rutherford, pp. 570, 580.

Mr. Wheaton says, speaking of the abstract right of the subject of belligerent powers to assail each other:

> "That the usage has modified this maxim, by legalizing such acts of hostility only as are committed by those who are authorized by the express or implied command of the State. Such are the regularly commissioned naval and military forces of the nation."
>
> "War does not consist merely nor even mainly of battles between great armies. On the contrary, it is based on innumerable minor acts of hostility."
>
> "It may be said generally, that if a government remains neutral and recognizes the existence of a war, its courts cannot consider as criminal those acts of hostility which war authorizes."

See *U. S.* v. *Palmer*, 3 Wheaton, 610.

The mere fact that this petitioner is an officer and acted on behalf of his government against another belligerent in other territory, although a necessary part of the act was committed within the territory of this government, makes his action that of a belligerent whether he has re-

ceived any instructions from his government or not, and operates entirely to deprive the municipal law of the United States of all power over him and to entirely divest his act of any character other than that of the act of his own government.

A NATIONAL ACT IS COGNIZABLE ONLY BY LAW OF NATIONS.

The moment an act becomes a national act, all private jurisdiction over it as regards individual responsibility ceases.

See 26 Wendell, 675.

It would be an absurdity to say that there can be two such jurisdictions of an opposite nature over the same offense as the general law of nations and the municipal law or local law of individual nations. The offense can be cognizable by the law of nations or by municipal law, it cannot be cognizable by both, and this rule cannot be evaded by selecting from an act referable for its approval or censure only to the law of nations a portion of, or an incident in, such act; and then attempting to subject such portion, or such incident, to trial by a municipal tribunal. The whole of the details and incidents which, in the aggregate, constitute a national or hostile act must be considered collectively. It is the hostile act or operation which must be regarded and not each minute detail of that act; to permit any departure from this rule would involve the gravest consequences.

The possession of a commission by the petitioner is his authority for his act, and this in itself is sufficient.

See *St. Albans Case,* p. 468.

The same principle of immunity applies to hostilities upon land and upon sea.

See 26 Wendell, 675.

COMMISSION AS OFFICER IN GERMAN ARMY.

Petitioner had a commission in German Army (R. p. 6). It read as follows, and, inasmuch as no denial of its authenticity is anywhere made, we must conclude that its genuineness is conceded by the prosecuting officials:—

"COMMISSION OF THE FIRST LIEUTENANT OF THE LANDWEHR (SECOND RESERVE) PIONEERS HORN

"Whereas, HIS ROYAL MAJESTY OF PRUSSIA,

"Our most gracious King and Lord, has resolved graciously to appoint First-Lieutenant Werner Horn, till now of the First West-Prussian Pioneer Battalion Number 17, one of the officers of the Landwehr (second reserve) Pioneers, conferring upon him a commission of this same grade of service.

"HIS MAJESTY does this herewith and by virtue of this commission in such a way and with the intent that the aforesaid Werner Horn further continue true, well-disposed, and obedient to HIS ROYAL MAJESTY and to the Royal House, that he discharge the obligations of his office in a becoming manner, that he execute diligently and loyally whatever is made his duty to do and carry out, and whatever is commanded him, by day and by night, on land and on sea, and that he will conduct himself bravely and irreproachably in all wars and military events that may occur, as accords within his official oath and duty; but that for the rest he shall also enjoy all the prerogatives and privileges connected with his charge and appertaining thereto.

"In Testimony and Record whereof HIS MAJESTY has authorized His Great Seal to be impressed hereon.

"So done and dated at Wilhelmshoehe, the 18th day of August, 1908."

AN OFFICER IS AMENABLE ONLY TO HIS OWN GOVERNMENT.

Moore Digest, Vol. 7, page 177, says: —

> "An officer of the army of the United States whilst serving in the enemy's country during the rebellion was not liable to an action in the Courts of that country for injuries resulting from his military orders or acts; nor could he be required by a cival tribunal to justify or explain them upon any allegation of the injured party that they were not justified by military necessity. He was subject to the laws of war and amenable only to his own government."

Horn's act was of a belligerent character and had all the external evidences of such.

Hall on International Law, at page 517, says: —

> "The evidences of intention to form part of the combatant class, which belligerents have been in the habit of exacting, fall under the heads of: —
>
> "1. The possession of an authorization given by the sovereign.
>
> "2. The possession of a certain number of the external characteristics of regular soldiers."

Horn was a commissioned officer and his commission is in the possession of the U. S. attorney prosecuting him in these proceedings. The commission constituted the petitioner's authority. Horn had external characteristics of a soldier of the German Army, viz., wore the German flag, and when arrested gave a true identification of himself as such.

That Horn acted as a belligerent soldier is clearly established by the very nature of his act, viz., the attempted

destruction of a bridge used as a means of transporting munitions of war.

Moore's Digest, Vol. 7, page 178, says:—

> "A belligerent has in a general sense the right to use all forms of violence against the person and property of his enemy that may be necessary to bring the latter to terms; so that violence, when used to that end, ceases to be permissible only when it is shown to be wanton, or grossly disproportionate to the end to be attained."

Chief Justice Marshall, in 4 Wheaton, page 52, says:—

> "The Government of the United States having recognized the existence of a civil war between Spain and her colonies, and remaining neutral, the Courts of the United States are bound to consider as lawful those acts which war authorizes and which the new government of South America may direct against her enemies."

Storey laid stress on the importance of a commission as a controlling factor in determining whether an offence was an act of war. In 8 Peters, at page 522, Storey, speaking of a seizure of an American vessel and cargo by a Spanish vessel, says that if he had a commission under the royal authority of Spain, she was, beyond question, entitled to make the seizure.

AUTHORITY MAY BE IMPLIED.

Horn's authority may be implied from the position of military rank in the service of the German government. The approbation or authority of the German government is not at all essential to bring this act within the immunity offered by International Law, particularly in view of Section 753, Revised Statutes.

As to implied authority derived from a commission, see Lawrence on Wheaton, page 248, ruling:—

> "But in the case of one having a commission from a party to a recognized civil power, no irregularity as to acts done jure belli will make a pirate."

Further upholding the reasoning that Horn's act was of a belligerent character, the Court is referred to *Underhill* v. *Hernandez*, 168 U. S., page 240, in which it is held by Chief Justice Fuller as follows:—

> "We entertain no doubt upon the evidence that Hernandez was carrying on military operations in support of the revolutionary party. It may be that adherents of that side of the controversy in the particular locality where Hernandez was the leader of the movement entertained a preference for him as the future executive head of the nation, but that is beside the question. The acts complained of were the acts of a military commander representing the authority of the revolutionary party as a government, which afterwards succeeded and was recognized by the United States. We think the Circuit Court of Appeals was justified in concluding 'that the acts of the defendant were the acts of the government of Venezuela and as such are not properly the subject of adjudication in the Courts of another government'."

The same case, at page 253, further says:—

> "If the political revolt fails of success, still if actual war has been waged, acts of legitimate warfare cannot be made the basis of individual liability."

See *U. S.* v. *Rice*, 4 Wheaton, 246.
Fleming v. *Page*, 9 How. 603.

Thorington v. *Smith*, 8 Wall, 1.
Williams v. *Bruffy*, 96 U. S. 176.
Ford v. *Surgat*, 97 U. S. 594.
Dow v. *Johnston*, 100 U. S. 158.
United States v. *Palmer*, 3 Wheaton, p. 328, says:

The authority of Lieutenant Horn for his act could be upon authority expressed or implied.

See Wheaton, pp. 266–7.

And in this case both kinds of authority appear to have existed. There surely is implied authority from the possession of the military rank in the service of the German government.

Express avowal by the German government is not essential to bring the act of the petitioner within the immunity offered him by international law.

In *U. S.* v. *Palmer*, 3 Wheaton, p. 328, the Court says: —

> "The proof of a commission is not necessary to exempt an individual serving on board a ship engaged in war, because any ship of a belligerent may capture an enemy; and whether acting under a commission or not, is an immaterial question as to third persons; he must answer that to his own government. It is only necessary to prove two facts: —
>
> "1. The existence of open war.
>
> "2. That the vessel is really documented, owned and commanded as a belligerent vessel, and not affectedly so, for piratical purposes."

The violation of a neutral country's right, such as the United States, by the use of neutral territory to carry out the hostile act against his country's enemy, did not deprive Lieutenant Horn of his belligerent character. Even though the laws of the neutral government are vio-

lated, the belligerent is not responsible to the municipal tribunals for his hostile acts.

Harcourt International Law, pp. 152, 155, 158, 162, sustained by citations from such masters of international laws as Grotius, Bynkershoeck and M. Ortolan.

Bynkershoeck, *supra.*
3 Wheaton, 435, *The Anne.*
3 Rob. 162, *The Etrusco.*
Brig Alerto v. *Blas Mornet*, 3 Peters, 425.
Wheaton, p. 722.
26 Wendell, pp. 633, 669.

In the case at bar the alleged facts constituting the basic foundation of Horn's alleged offense against U. S. laws is that he transported explosives from New York City in the State of New York, to Vanceboro, in the State of Maine. What was the intent? The answer is obvious: to attempt the destruction of the bridge connecting Vanceboro with Canadian soil, which immediately followed his arrival at Vanceboro.

It was one act of a belligerent nature from its inception in New York City to its consummation in New Brunswick. But a single day was consumed in its execution. It is playing with the law to attempt to separate the whole transaction into distinct parts with the sole purpose apparent, viz., to secure jurisdiction.

This government, that was the first to recognize, in our Constitution, the existence of International Law, and the duty of enforcing it, surely will not attempt to defeat a well recognized doctrine of International Law by such a subterfuge as is here displayed.

QUESTION OF PUNISHMENT IS FOR STATE DEPARTMENT, NOT FOR OUR LAW COURT.

The petitioner does not contend that his acts must go unpunished. If a wrong has been committed, it is more certain of adequate and suitable punishment under the usages and practices of International Law than under our Municipal Law. His contention limits itself to the well established doctrine that an act of war, even by a belligerent against a neutral, is a violation of the law of nations and therefore subject not to the tribunal of municipal administration but to the more august attention of International Law.

> "An individual forming part of a public force and acting under the authority of his government is not to be held answerable as a private trespasser or malefactor. This is a principle of public law sanctioned by usages of civilized nations and which the government of the United States is not inclined to dispute." (See 26 Wendell, 683, *quoting the instruction of Mr. Webster, Sec. of State, to the Attorney-General.*)

The revenue and police regulations of a country have never been recognized by international law as coming within the rules regulating the conduct of other nations. (See *Opinions of Attorney-General, Vol.* 21, *page* 271, *citing the Steamship Florida, Ben.* 452; *Abdys Kent. Int. Law,* 491. *Simmons cases on International Law,* 497.)

Lawrence's Principles of International Law at page 554 says:—

> "We may now conclude our attempt to set forth the duties of neutral states toward belligerent states; but before we leave the subject it will be useful to indicate very briefly what are the powers possessed by neutral governments for the protection of their

neutrality. They have first the remedy by diplomatic complaint. As a rule their remonstrances are sure of a respectful hearing; . . . adequate reparation will generally be accorded in answer to reasonable demands."

The United States Government has not as yet availed itself of the remedy referred to by Lawrence, viz., diplomatic complaint.

Oppenheim, on International Law, 2d Ed. (1912), Vol. 2, page 439, says: —

"Violations of neutrality, whether committed by a neutral against a belligerent, or by a belligerent against a neutral, are *international delinquencies.*"

Oppenheim, Vol. 1, page 208, says: —

"For States are, according to the law of nations, in a sense responsible for certain acts other than their own, namely, certain unauthorized injurious acts of their agents, or their subjects, and even to such aliens as are for the time living within their territory. This responsibility of States for acts other than their own I name 'vicarious' responsibility. . . . On the other hand, the vicarious responsibility which a State bears requires chiefly compulsion to make those officials or other individuals who have committed internationally injurious acts repair as far as possible the wrong done, and punishment, if necessary, of the wrong-doers. . . . Page 212, Sec. 155. . . . International delinquencies may be committed against so many different objects that it is impossible to enumerate them. It suffices to give some striking examples. . . . And a neutral may in time of war be injured in various ways through a belligerent violat-

ing neutrality by acts of warfare within the neutral States' territory."

Wheaton, 4th Ed., page 480, *In re Capture of Chesapeake* in Canadian waters:—

> "It is admitted that their own acts were in strictness of law, a 'violation of the law of nations, and of the friendly relations existing between the two countries' . . . England was entitled to look upon this capture as prima facie, a belligerent act. . . . They were entitled to prove themselves belligerents if they could."

SUMMARY.

The first and second errors (R. p. 32) embrace the full scope of the Circuit Court decision. The petitioner believing the detailed discussion of the other errors, prior to consideration of the two which are general in their force and effect, has made clear the basic principles involved, now summarizes the reasons why the writ of habeas corpus should issue.

The first paragraph of the Circuit Court opinion (R. p. 26) reads:—

> "We are of the opinion that the petition of Werner Horn, the appellant, for a writ of habeas corpus was properly denied, and that it appears from the petition itself that the petitioner is not entitled to the writ."

The petitioner contends that it is clear from the allegations of the petition **that he is entitled to the writ** for the following reasons:—

(1) The exclusion of evidence by the United States Commissioner pertaining to the Commissioner's jurisdiction **was a denial of due process of law.**

(2) The order of Putnam, J., prohibiting the filing of

the petition for the issuance of the writ of habeas corpus presented to the clerk of the District Court of Maine **was a denial of due process of law.**

(3) The refusal of Putnam, J., to receive or consider the same petition **was a denial of due process of law.**

(4) The refusal of Hale, J., to receive or consider the habeas corpus petition presented to him **was a denial of due process of law.**

(5) The issuance of the removal warranted by Putnam, J., **was void because of foregoing described denials of due process of law.**

(6) Morton, J., ruled erroneously: —

(*a*) *That the petition did not allege that the petitioner's acts were authorized or avowed by the foreign state whose commission he holds; and the petition did not allege facts entitling him to issuance of the writ.* The petitioner's reply thereto is that the provisions of the Revised Statutes do not directly or by implication require allegations of such facts. Possession of his commission as a military officer of a belligerent nation and that he acted under color of authority, with other similar facts pleaded, were sufficient to support his petition and overcome the demurrer.

(*b*) *That the Court had no power to revise or correct judicial proceedings in Maine, and that the order of removal appearing regular on its face the Court ought not to go behind it, nor to examine the conduct and alleged mistakes in relation thereto.* The answer to the foregoing is that the alleged mistakes and proceedings in Maine involved a question of jurisdiction and denials of due process of law which rendered the warrant void, and therefore a subject of review.

(7) The Circuit Court erroneously supported Morton, J.:

(*a*) *In ruling that the petitioner should have alleged the "authority" and "avowal" of his foreign state.* The petitioner's reply thereto is the same as stated above.

(*b*) *In ruling that "it is immaterial whether an earlier petition to the same unmeritorious effect was or was not erroneously refused consideration", and that its conclusion "cut under all other questions raised".* This in effect upholds Morton, J., in his refusal to review the acts and proceedings in Maine, which the petitioner contends were a subject of review and correction. Such a conclusion of "immateriality" would nullify the mandatory provisions relating to habeas corpus, and, based upon the act of Putnam, J., as a precedent, sanction and approve an illegal practice.

(*c*) *That the petitioner has had a full "hearing upon the merits of his claim to immunity from trial".* The petitioner contends that he has not at any time had a full hearing, because —

FIRST. The Commissioner refused to receive the evidence offered to establish his claim to immunity.

SECOND. Putnam, J., refused to accord any consideration to his petition for the writ of habeas corpus.

THIRD. Hale, J., refused to accord any consideration to the petition presented to him.

FOURTH. Morton, J., refused to accord a hearing upon the merits of the petition before him, such arguments as made at the hearing upon the demurrer being confined to questions of law.

Upon the foregoing, and other contentions heretofore more fully argued in this brief, the petitioner asks for his discharge or that he be remanded to the District of Maine or granted such relief as will accord with law and justice.

Respectfully submitted,

JOSEPH F. O'CONNELL,
JAMES E. O'CONNELL,
DANIEL T. O'CONNELL,
Counsel for Appellant.

INDEX AND SUMMARY.

Page.

THE QUESTION INVOLVED..... 1

THE ARGUMENT:

I. The appeal is frivolous and should be dismissed for want of jurisdiction. This court has no jurisdiction in appeals from the Circuit Court of Appeals in habeas corpus proceedings. This has long been settled law and was held as recently as June 12, 1916, in Healy v. Backus, 241 U. S. 655..... 5

II. The prisoner's claim for immunity from prosecution under the Federal statute in question on the ground that he was a reservist officer of the German Army committing an act of war, is not based on any recognized doctrine of international law, and was not a defense either to the removal proceedings in Maine or to the indictment in Massachusetts..... 7

III. The prisoner's claim of immunity from punishment for a violation of the laws of the United States on the ground that the prisoner was an officer of the German Army, and, as such, committing an act of war, is, if valid, a matter of defense upon trial and does not go to the jurisdiction of the court. It will not support a petition for habeas corpus. Or at least it presents a ground on which the Federal court has a discretion as to whether it will issue the writ prior to actual trial..... 17

Page.

IV. The grounds alleged by the prisoner in his petition for habeas corpus relating to irregularities in the hearing before the United States commissioner in Maine are disposed of by the considerations above set forth relating to international law. The proceedings before the commissioner were entirely regular, and the commissioner had jurisdiction 24

V. The allegations of the prisoner in his petition for habeas corpus relating to the refusal of certain United States judges in the District of Maine to entertain another and separate petition for habeas corpus prior to his actual removal to the District of Massachusetts by order of court afford no ground for the issue of the present writ of habeas corpus. Even if the previous petition was wrongfully refused or denied (which we do not admit), such refusal or denial is no reason for the granting of a second distinct petition, when the court to whom the second petition is proffered has clear jurisdiction of the person, and of the crime 28

VI. The appellant now being within the jurisdiction of the court in which the indictment against him was found and having been removed thereto under due form of law, must stand for trial within that district 31

CONCLUSION 32

CITATIONS.

CASES.

	Page.
Beavers v. *Henkel* (1904), 194 U. S. 73, 83	31
Bingham v. *Bradley* (1916), 241 U. S. 511	5
Burley, In re, 1 Upper Canada Law Journal 20	14
Commonwealth v. *Blodgett*, 12 Metcalf 56, 89	15
Commonwealth of Massachusetts, petitioner, In re (1905), 197 U. S. 482	29
Ex parte Royall (1886), 117 U. S. 241, 251	20, 24, 30
Fisher v. *Baker* (1906), 203 U. S. 174, 181	6
Frank v. *Mangum* (1915), 237 U. S. 309, 326	19
Healy v. *Backus* (1916), 241 U. S. 655	5, 6
Henry v. *Henkel* (1914), 235 U. S. 219, 228	19, 29
Kelly v. *Griffin* (1916), 241 U. S. 6	5, 31
Lau Ow Bew v. *United States* (1892), 144 U. S. 47, 58	6
Lennon, In re (1893), 150 U. S. 393, 400	5, 6
McClellan v. *Carland* (1910), 217 U. S. 268, 278	6
Mahon v. *Justice* (1888), 127 U. S. 700	31
People v. *McLeod* (1841), 25 Wend. 482; 1 Hill 377	10, 14, 18, 21
Pettibone v. *Nichols* (1906), 203 U. S. 192	31
St. Albans Case ("The St. Albans Raid," by L. N. Benjamin)	14
Tinsley v. *Treat* (1907), 205 U. S. 20	27, 30
Underhill v. *Hernandez* (1897), 168 U. S. 250, 252	21
Whitney v. *Dick* (1906), 202 U. S. 132, 135	6

STATUTES.

August 29, 1842, c. 257 (5 Stat. 539)	18
March 3, 1885 (23 Stat. 437)	6
May 30, 1908, c. 234	1
Revised Statutes, sec. 753	17, 18
Judicial Code, sec. 128	5
Judicial Code, sec. 234	29

	Page.
Judicial Code, sec. 236	29
Judicial Code, sec. 238	5
Judicial Code, sec. 241	5
Penal Code, secs. 232–235	1, 8
Penal Code, sec. 232	2
Penal Code, sec. 233	2
Penal Code, sec. 234	2
Penal Code, sec. 235	2
Penal Code, sec. 236	2, 8

MISCELLANEOUS.

Exec. Doc., 27th Cong., 1st sess., p. 15	10
20 Moore on Extradition, vol. 1, pp. 319–322	14
Judge Tallmadge's Article, 26 Wend. 683	11, 21

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

WERNER HORN, APPELLANT, *v.* JOHN J. MITCHELL, UNITED STATES marshal for the District of Massachusetts.	No. 679.

BRIEF OF JOHN J. MITCHELL, APPELLEE.

THE QUESTION INVOLVED.

In this case the record and the brief filed by the appellant prisoner, Horn (pp. 58–77), so bristle with allegations as to belligerent acts performed by the appellant—acts of war—that in order to preserve the peaceful state of mind appropriate to a legal document, it is necessary to grasp tightly the fundamental fact that Horn was not indicted for the commission of any act of war or for any violation of any Federal neutrality law; but was indicted simply for a violation of the act of May 30, 1908, c. 234 (now sections 232–235 of the Criminal Code), known as "An act to promote the safe transportation in interstate commerce of explosives and other dangerous articles, and to provide penalties for its violation."

These sections penalize the interstate and foreign transport of dynamite, liquid nitroglycerine, or other explosives on a vessel or vehicle operated by a common carrier, carrying passengers for hire (sections 232 and 234); and penalize the violation of regulations framed by the Interstate Commerce Commission for the safe transportation of explosives by all common carriers (section 233); and penalize the transport or delivery to a common carrier of packages containing explosives unless the contents are plainly marked on the outside (section 235). Section 236 also prescribes a heavy punishment for one who places any such package or article on a vessel or vehicle whereby death or bodily injury is caused by explosion.

Horn, the appellant, was indicted at the February term, 1915, in the District Court of the United States for the District of Massachusetts for an act committed in that District; described in his brief (p. 3), as—

> that he did on January 30, 1915, unlawfully, knowingly, wilfully and feloniously transport explosives from New York, through Massachusetts, to Vanceboro, Maine, contrary to law.

It is at this point that the appellant injects war into the record.

In a special plea filed in proceedings initiated by the Government in the District of Maine for removal of the appellant, Horn, into the District of Massachusetts, Horn asserts, in substance, that having a commission as an officer in the Landwehr Division of the

German Army Landwehr (Second Reserve) Pioneers (see appellant's brief, p. 71), he is accused of having blown up a bridge in Canada by explosives (Rec. 4, 5, 6, 17; appellant's brief, p. 54); that the offense charged in the indictment was "inseparable to the blowing up of said bridge" (Rec. 6); that

> he is now held in custody by the respondent on the charge of carrying explosives illegally, which allegation if true is inseparably connected with the destruction of the said bridge; that he is a subject and citizen of the Empire of Germany and domiciled therein and is being held in custody for the aforesaid act which was done under his right, title, authority, privilege, protection and exemption claimed under his commission as said officer as described aforesaid. (Rec. 17.)

In short, Horn claims that in transporting dynamite through Massachusetts in violation of a Federal interstate commerce statute, he was committing an act of war against Great Britain under authority of his commission as a German officer.

It is on the immunity contended for by the above plea that Horn based his present petition for habeas corpus filed in the District Court of the United States for the District of Massachusetts in the case at bar, April 2, 1915 (Rec. 2–15), claiming that the United States commissioner in Maine had no jurisdiction to commit him for removal, and that the United States judge in Maine had no jurisdiction to order his removal to Massachusetts for trial on the indictment, and that

the United States District Court in Massachusetts had no jurisdiction to commit him to jail for failure to give bail awaiting trial on the indictment.

Other grounds on which Horn bases his present petition for habeas corpus are:

> (*a*) Alleged wrongful exclusion of certain evidence by the United States commissioner in Maine, offered by Horn in the removal proceeding;
>
> (*b*) Alleged wrongful acts of the United States circuit judge, Putnam, and United States district judge, Hale, in Maine, in declining to act upon a separate and distinct petition for habeas corpus filed by Horn in Maine, prior to his removal to Massachusetts and prior to the petition for habeas corpus filed in the case at bar.

The prisoner Horn's petition for writ of habeas corpus was denied and dismissed by Judge Morton, sitting in the District Court of the United States for the District of Massachusetts, June 28, 1915 (Rec. 18–21), and on appeal to the Circuit Court of Appeals for the First Circuit the judgment of the District Court was affirmed, April 27, 1916 (Rec. 26–31). The prisoner, Horn, has brought the case to this court on appeal from the Circuit Court of Appeals.

ARGUMENT.

I.

The appeal is frivolous and should be dismissed for want of jurisdiction. This court has no jurisdiction in appeals from the Circuit Court of Appeals in habeas corpus proceedings. This has long been settled law and was held as recently as June 12, 1916, in Healy v. Backus, 241 U. S. 655.

As the prisoner alleged in his petition certain facts involving the construction or application of the Constitution and of treaties of the United States, he might have had a direct appeal from the District Court under section 238 of the Judicial Code, as in *Kelly* v. *Griffin* (1916), 241 U. S. 6, and *Bingham* v. *Bradley* (1916), 241 U. S. 511. He clearly could not have appealed from the District Court on the ground that the jurisdiction of that court "to hear and determine whether he was lawfully held in custody" (In re Lennon (1893), 150 U. S. 393, 400), was involved.

The prisoner, however, took an appeal to the Circuit Court of Appeals under Judicial Code, section 128, apparently on the theory that the case was one "other than those in which appeals and writs of error may be taken direct to the Supreme Court." If the judgment of the Circuit Court of Appeals was not final, an appeal or writ of error lay to this court only by virtue of and in accordance with the provisions of Judicial Code, section 241, under which section an appeal or writ of error will lie "in any case in which the judgment or decree of the Circuit Court of

Appeals is not made final by the provisions of this Title," *but only "where the matter in controversy shall exceed one thousand dollars, besides costs."* (Italics ours.)

Such an appeal does not lie, however, in cases of habeas corpus, the matter in dispute having no money value.

> *Cross* v. *Burke* (1892), 146 U. S. 82, 88;
> *Fisher* v. *Baker* (1906), 203 U. S. 174, 181;
> *Lau Ow Bew* v. *United States* (1892), 144 U. S. 47, 58;
> *Whitney* v. *Dick* (1906), 202 U. S. 132, 135;
> *Healy* v. *Backus* (1916), 241 U. S. 655.
> See also *McClellan* v. *Carland* (1910), 217 U. S. 268, 278.

If the appellant is of opinion that his appeal lies under Revised Statutes, section 764, as amended by the act of March 3, 1885 (23 Stat., 437), attention is called to the fact that this section was repealed by the judiciary act of 1891 (*Cross* v. *Burke* (1892), 146 U. S. 82, 88; *In re Lennon* (1893), 150 U. S. 393, 399); and, moreover, this section has no reference whatever to appeals from the Circuit Court of Appeals.

II.

The prisoner's claim for immunity from prosecution under the Federal statute in question on the ground that he was a reservist officer of the German Army committing an act of war, is not based on any recognized doctrine of international law, and was not a defense either to the removal proceedings in Maine or to the indictment in Massachusetts.

The prisoner's contention seems to be most clearly set forth in the amendment to his petition (Rec. 17), as follows:

> That your petitioner is an officer in the army of the Empire of Germany, to wit, a first lieutenant in the division of the aforesaid army known as the Landwehr; that a state of war exists between the Empires of Great Britain and Germany, which state of war has been recognized by the President of the United States in an official proclamation; that your petitioner is accused of destroying part of the international bridge in the township of McAdam, Province of New Brunswick and Dominion of Canada; that he is now held in custody by the respondent on the charge of carrying explosives illegally, which allegation if true is inseparably connected with the destruction of the said bridge; that he is a subject and citizen of the Empire of Germany and domiciled therein and is being held in custody for the aforesaid act which was done under his right, title, authority, privilege, protection and exemption claimed under his commission as said officer as described aforesaid.

The Government contends that, in the first place, the plea is bad because in fact and in law there was not an inseparable connection between the destruction of a bridge in Canada and the illegal interstate transportation of explosives from or into the State of Massachusetts in violation of sections 232 to 236 of the Federal Criminal Code.

These statutes are necessary and highly important domestic regulations of commerce, designed chiefly for the protection of the lives of passengers and others in connection with interstate transportation. Violations of these statutes are felonies, attended by serious penalties, in some instances as grave as imprisonment for 10 years. The prisoner himself, if convicted, may be punished under section 235 by fine of not more than $2,000 or imprisonment of not more than 18 months, or both. As stated by the Circuit Court of Appeals (Rec. 28, 29):

> A disregard of the safety of fellow passengers on trains engaged in interstate commerce, and a violation of statutory regulations of interstate commerce, constitute the gravamen of the offense, and this is not necessarily connected with the transportation of explosives and is not war against the United States or Great Britain.
>
> * * * *
>
> The connection between the use of prohibited means of transportation and the subsequent use of the explosive to destroy a bridge is remote. The act of war, if we may call it such, can be completely described without any

reference to the mode in which the explosive was conveyed to the scene of its use. Whether the explosive was transported lawfully or unlawfully has no causal connection with its use or its effectiveness to destroy a bridge.

Likewise the offense against the United States may be fully described without any reference to the use of the explosive after transportation.

The connection so far from being "inseparable" is wholly artificial for the purpose of invoking a single ground of exemption for two separate acts.

* * * *

The two offenses charged, therefore, are clearly distinct and separate, for they do not involve the same acts, nor parts of the same act; but each is complete in itself without involving as a part or element any act or intent essential to the other. They differ completely in time and place and in the acts charged. Both in fact and in law the transactions are substantially different and separate.

* * * *

The theory that what Horn did in the United States was a mere detail or incident of an act of war done in British territory by Germany against Great Britain would lead to the conclusion that neither Horn nor his Government is responsible to the United States.

The court might also have pointed out that the prisoner could have taken dynamite to Canada for the purpose of blowing up a bridge there, in full compliance with the Federal statutes in question.

He was under no necessity of taking dynamite on a passenger train, or in packages not in accordance with the regulations of the Interstate Commerce Commission. He might also have blown up the bridge with dynamite not transported in interstate commerce at all.

The alleged inseparability is a pure fiction, in fact and in law.

The Government contends, in the second place, that even if this court should hold Judge Cowen's decision in *People* v. *McLeod* (July, 1841), 25 Wendell, 482; 1 Hill 377, to be wrong (and no court has yet done so), no doctrine of international law affords the prisoner the immunity claimed by him on the facts presented by this case.

The most extreme statement of any doctrine of international law recognized by this country as permitting exemption of an alleged military officer (other than a diplomatic representative) from prosecution for crime is that made by Webster, as Secretary of State, in his correspondence with the British minister in relation to the McLeod-Steamer *Caroline* affair, April 24, 1841 (Exec. Doc., 27th Cong., 1st sess., p. 15; also quoted in 25 Wend., pp. 487–512):

> The government of the United States entertains no doubt that, after this avowal of the transaction, as a public transaction, authorized and undertaken by the Bristish authorities, individuals concerned in it ought not, by the principles of public law, and the general usage of civilized States, to be holden personally re-

> sponsible in the ordinary tribunals of law, for their participation in it.

This was in answer to Fox's letter to Webster of March 12, 1841 (ibid, p. 13):

> The grounds upon which the British government make this demand upon the government of the United States are these: that the transaction on account of which Mr. McLeod has been arrested, and is to be put upon his trial, was a transaction of a public character, planned and executed by persons duly empowered by her Majesty's colonial authorities, to take any steps and to do any acts which might be necessary for the defense of her Majesty's territories, and for the protection of her Majesty's subjects; and that consequently, those subjects of her Majesty, who engaged in that transaction, were performing an act of public duty, for which they cannot be made personally and individually answerable to the laws and tribunals of any foreign country.

And as stated by Webster in his letter of instruction to John J. Crittenden, Attorney General of the United States, March 15, 1841 (ibid, pp. 23, 24; also quoted in 26 Wendell, 683):

> There is therefore now an authentic declaration on the part of the British government that the attack on the *Carolina* was an act of public force done by military men, under the orders of their superiors, and is recognized as such by the Queen's government.
>
> * * * * *

> That an individual forming part of a public force, and acting under the authority of his government, is not to be held answerable as a private trespasser or malefactor, is a principle of public law sanctioned by the usages of all civilized nations, and which the government of the United States has no inclination to dispute.

But, as stated by the Circuit Court of Appeals (Rec. 29, 30):

> This exemption of the individual is on the ground that his act was a national act of his sovereign, and thus to be dealt with between nations under the law of nations.
>
> Upon what theory, then, is this act of Horn's in the United States to be held a national act of his sovereign? There is no allegation that what he did in the United States or in Canada was specifically authorized or avowed by the appellant's government. He relies upon a commission as a first lieutenant of the Landwehr (second reserve) Pioneers, which is dated August 18, 1908; but this is insufficient to show that he had been called to active service, or had become a part of an armed force. Surely his Government, upon the mere ground that it has issued such a commission, cannot, as a nation, be presumed to have authorized his acts either here or in Canada.
>
> It is urged that implied authority is sufficient; but the holding of a commission of this kind is no basis for an implication either of

authority in Horn or of responsibility of his government.

As the only authority asserted by Horn is under his commission, which, in our opinion, is no evidence of authority to do any acts as a belligerent within the United States, we find no ground for extending to him any of the privileges or exemptions which might result from a finding that his act was a national act. Due respect to his government would forbid us from imputing to it a national responsibility to the United States upon such facts as are set forth in the petition.

* * * * *

The fact that Horn holds such a commission as he relies upon, in our opinion, is insufficient to show authorization of an attack upon Great Britain in Canada; but even if such authority to attack a public enemy follows from such a commission, it affords no implication of authority for a violation of the laws of a neutral nation in a matter having so remote a relation to the proximate act of exploding an explosive substance in hostile territory.

There is no allegation by the appellant, Horn, of any express authority to him from the German Government to transport explosives in or from the State of Massachusetts in violation of Federal law, nor any adoption of his criminal transportation of such explosives in the United States. There is no allegation that the German Government has even expressly authorized or adopted Horn's act in blowing up the bridge in Canada.

74702—17—3

In the *McLeod Case, supra*, there was an express adoption of McLeod's acts by the British Government.

In the *St. Albans Case* (see "The St. Albans Raid," by L. N. Benjamin), cited by appellant (Brief, pp. 64, 70), the acts were committed in the country of one belligerent (the United States) by an officer of the other belligerent (the Confederate States). Moreover, it was stated by the court in releasing the officer on habeas corpus that the officer was acting "under his instruction from his Government, which he exhibited then, and as a commissioned officer; that he then reported his doings to Mr. C. C. Clay, who gave him a memorandum approving them, also approving and authorizing the expedition against St. Albans."

In *In re Burley*, 1 Upper Canada Law Journal, 20; *Moore on Extradition*, Vol. I, pp. 319–322 (not cited on appellant's brief), the officer's commission bore an indorsement in the form of a proclamation of President Davis declaring that the enterprise was a belligerent expedition *ordered and undertaken under the authority of the Confederate Government and for which the Government assumed responsibility*. Yet in spite of this, the officer (Burley) was extradited from Canada and brought to trial in Ohio—even the express authority of the sovereign thus not serving to relieve the individual from personal responsibility under the municipal laws. This case was decided about six weeks before the *St. Albans Case*.

The appellant, Horn, apparently relies on an implied authority from the German Government arising

out of his possession of a commission as a reservist officer in the Landwehr. There is nothing in the record to show that Horn had been actually summoned to the colors, or was an active member of the armed forces of the German Empire. But if there were such evidence in the record, mere possession of a commission cannot constitute proof of authority to commit the acts for which he has been indicted. There is no doctrine recognized by international law that merely by virtue of holding a commission an army officer is authorized to enter neutral territory and there violate the criminal laws of the neutral country. (See *Com.* v. *Blodgett*, 12 Metcalf, 56, 89.)

The appellant's contention in its essence amounts to this: That any officer of the reserve forces of the armies of Europe who holds a commission and who is within our territory, may with impunity violate any or all of our statutes, if in his opinion his act will be of benefit to his Government and of a hostile character toward a nation with which his Government is at war; that he may with impunity do within our borders anything which in his estimation will enable him to carry on such an assumed part in a war waged by his country. And if this doctrine applies to one reservist officer it applies to thousands.

Such a condition threatens the very life and sovereignty of our Government; and nothing could be more destructive of international law itself than to hold that acts of foreign individuals, not expressly authorized or adopted by their Government, in derogation of the municipal laws of a friendly neutral nation, are acts of the foreign nation and not of the

individual. Such a holding would be a threat to the safety of this country and to the peace of the world. It would make this country, during the present war, a playground for belligerent foreign dynamiters holding commissions in foreign armies.

Certainly, this court will not imply an authority from the German Government to one of its subjects to violate the criminal laws of the United States. Certainly, this court will not assume that the German Government deliberately or impliedly authorized its officer to wage war on the soil of a friendly neutral nation.

The appellant constantly seeks to cloud the issue; thus, on page 75 of his brief, he says:

> The violation of a neutral country's right, such as the United States, by the use of neutral territory to carry out the hostile act against his country's enemy, did not deprive Lieutenant Horn of his belligerent character.

But Horn was not indicted for carrying out any "hostile act against his country's enemy." He was indicted for a criminal act against the United States in illegally transporting dynamite through Massachusetts—an act entirely completed prior to his going into Canada and there destroying a Canadian bridge.

So, on page 64 of the brief, appellant speaks of "Horn's contention, that he was within his rights as a belligerent in attempting on British soil to stop shipments of munitions of war." The answer to this is that whether he was or was not within his rights as a belligerent in such an attempt, this is not the act for which he was indicted.

III.

The prisoner's claim of immunity from punishment for a violation of the laws of the United States on the ground that the prisoner was an officer of the German Army, and, as such, committing an act of war, is, if valid, a matter of defense upon trial and does not go to the jurisdiction of the court. It will not support a petition for habeas corpus. Or at least it presents a ground on which the Federal court has a discretion as to whether it will issue the writ prior to actual trial.

The appellant in his brief seems to labor under the fundamental misapprehension that Revised Statutes, section 753, provides, "*when the writ of habeas corpus shall issue*" (appellant's brief, p. 39); whereas, in fact, that section simply states the classes of prisoners in jail who *may petition a Federal judge for the issue of the writ.*

Whether after petition filed the judge *shall issue the writ* depends upon the questions presented by the petition, and well-settled doctrines of law as to the circumstances under which the writ will issue.

The appellant's misconception of the statute is shown clearly in his statement (on pp. 60–63 of his brief) that—

> it was not necessary that Lieutenant Horn should specifically set out that he was authorized or commanded by the German government or that it has avowed its responsibility therefor.

Of course it was not necessary for Horn in his petition for habeas corpus, to state that the German Government authorized him for he could bring himself within

the class of persons authorized to petition a Federal court for habeas corpus (under Rev. Stat. 753) by merely *claiming* a right "under the commission, or order, or sanction of any foreign state or under color thereof." But when, after filing his petition, he was confronted with the necessity of *establishing* his right to the writ, then of course he must prove the existence of the right which he claims.

Revised Statutes, section 753, prescribes the various and only classes of persons in custody who may petition a Federal judge or court for habeas corpus, and the present petitioner, appellant Horn, seeks to bring himself within one of those classes, viz, as—

> being a subject or citizen of a foreign state, and domiciled therein * * * in custody for an act done * * * under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state or under color thereof, the validity and effect whereof depend upon the law of nations.

This class of persons entitled to petition was constituted by the act of August 29, 1842, c. 257 (5 Stat. 539), after the decision of Cowen, J., in *People* v. *McLeod* (1841), 25 Wend. 482; and chiefly to afford a method by which persons in the custody of State courts might bring international questions before the Federal courts. But there was clearly no intent to give them any greater rights to actual release than other prisoners had.

As stated by Judge Morton (Rec. 20):

> The part of this section relating to subjects and citizens of foreign states was passed because of the McLeod case and was designed to give jurisdiction of such matters to the Federal courts. It does not seem to me that it gives to such subjects or citizens more absolute rights to habeas corpus than to the classes of prisoners specified therein.

In other words, such a prisoner, "subject or citizen of a foreign state," is entitled to the issuance of the writ only under the same conditions as those which entitle a prisoner "in custody in violation of the Constitution or of a law or treaty of the United States," or a prisoner "in custody for an act done or omitted in pursuance of a law of the United States."

Ordinarily, as stated in *Frank* v. *Mangum* (1915) (237 U. S. 309, 326), the only question open on habeas corpus is: Did the court have "plenary jurisdiction over the subject matter or offense, the place where it was committed, and the person of the prisoner?"

There may also be, in extraordinary cases, certain other questions open on habeas corpus when the suit involves a conflict of jurisdiction between State and Federal authority, or where the treaty rights and obligations of the United States are involved (*Henry* v. *Henkel* (1914), 235 U. S. 219, 228); or when a Federal court issues the writ in order to take a person out of the custody of a State court in a case "involving the authority and operations of the General Government, or the obligations of this country to, or its

relations with, foreign nations" (*Ex parte Royall* (1886), 117 U. S. 241, 251).

The prisoner, therefore, in order to establish his right to the issue of the writ of habeas corpus must bring his case within one of the above classes of suits.

As stated *supra*, the basis of the prisoner's petition is the alleged fact that, being an officer of the Landwehr (Second Reserve) Pioneers of the German Army, committing in the United States an act of war under his authority as such officer, he "cannot be regarded as a criminal by any neutral nation; for he is innocent of any offense against international law, even though committed against the municipal law of the United States" (see his special plea in his Petition, par. 5, subdiv. 6, Rec. 5), and that "the counts in the indictment on which the order of arrest was made * * * are cognizable only by the law of nations, and he is necessarily free from liability and punishment by the courts of the United States Government." (See his special plea in his Petition, par. 5, subdiv. 8, Rec. 5.)

Does this plea present a question of the jurisdiction of the United States District Court for the District of Massachusetts? Or does it present any question involving the authority of the United States or its treaty relations, which required the district court to issue the writ prior to trial?

The indictment clearly charges a Federal crime, and a crime committed in Massachusetts; the prisoner is within the district of the Federal court in which the indictment was returned. This is not

denied. The prisoner's plea is simply that while he may have done the acts for which he was indicted, his official character was such that such acts when performed by him did not constitute a violation of law for which he can be tried.

But such a plea clearly sets up a matter of substantive defense. It does not challenge the jurisdiction of the court.

Thus, in *Underhill* v. *Hernandez* (1897), 168 U. S. 250, 252, on a trial in the Circuit Court of the United States on a suit for false imprisonment, at the conclusion of the plaintiff's case, the court ruled that on the facts he could not recover, "because the acts of defendant were those of a military commander, representing a *de facto* government in the prosecution of a war, he was not civilly responsible therefor." On a writ of certiorari, this court sustained the decision upholding "the immunity of individuals from suits brought in foreign tribunals for acts done within their own States, in the exercise of governmental authority, whether as civil officers or as military commanders."

It seems clear that the facts presented a substantive defense, and not a question of the jurisdiction of the Circuit Court.

On this point, there is an illuminating statement by Judge Tallmadge in a review of Judge Cowen's opinion in the *McLeod case* (1841), 25 Wend. 483, printed in the appendix to 26 Wendell, page 663. McLeod had set up as a defense that the killing by him, committed on the soil of the State of New York, was done as a public act of a person obeying the

constituted authorities of his Government and not triable by the courts of New York. Judge Tallmadge said on the question of jurisdiction (p. 663):

> * * * As we understand it, the case of *McLeod* does not involve any question of jurisdiction: for it must be conceded that our State courts have jurisdiction over all cases of murder committed within the boundary of the state. *McLeod's* case presents for consideration—not of jurisdiction, but a question of guilt or innocence; whether the homicide with which he is charged be a crime according to the law of nations. If a sheriff should, in pursuance of a sentence, hang a person convicted of murder, and after the execution it should be ascertained that the person executed was innocent, and a grand jury should thereupon indict the sheriff for the murder of the person executed, the sheriff could not interpose an objection to the jurisdiction of the court, but would rely for his defense and justification upon the fact of a conviction by a court of competent jurisdiction; thereby showing that the homicide in him was not a crime. So, also, if a soldier should be tried by a court-martial and sentenced to be shot; and, after his execution, those engaged in it should be indicted for murder, their defense would not be a want of jurisdiction in the state court, but a justification before that court, under a regular court-martial conviction and sentence, thereby showing that the homicide was not a murder. Suppose, after the peace with Great Britain, a British soldier had come

> within our state and had been arrested and indicted for murder committed in the attack on Buffalo, during the war; he would not think of raising a question of jurisdiction in the court, but would rely on the law of nations to justify the homicide, and relieve him from the charge of crime. Indeed, whenever a question of the jurisdiction of a court is raised, it necessarily admits the charge or claim preferred. The plea to the jurisdiction is one of confession and avoidance. Surely the counsel of *McLeod* never intended to admit, for a moment, the crime of murder, with which he was charged, and seek to escape its consequences by alleging that the court had not jurisdiction over the offense.

As Judge Tallmadge pointed out, the act committed by McLeod when done "under the sanction and authority" of his Government did not constitute the crime of murder, and it was for that reason that he was entitled to be discharged, and not because the court had no jurisdiction to try him.

So, in the case at bar, the prisoner alleges that it was his duty as a reservist officer of the German Government to commit the action for which he is indicted, and hence that he is not guilty of any criminal act. This defense, however, is not one of jurisdiction, but simply a question whether or not the act committed was in fact and in law a criminal violation of the Federal statute. Such a question could only be presented on a writ of error after trial and conviction. It can not be decided on habeas corpus.

And, at all events, it was clearly discretionary with the United States District Court to decline to issue the writ in such a case, until after trial and conviction on the indictment. (*Ex parte Royall* (1886), 117 U. S. 241, 250.)

IV.

The grounds alleged by the prisoner in his petition for habeas corpus relating to irregularities in the hearing before the United States commissioner in Maine are disposed of by the considerations above set forth relating to international law. The proceedings before the commissioner were entirely regular, and the commissioner had jurisdiction.

The proceedings before the commissioner were regular. Upon the hearing before the commissioner, the Government offered in evidence a copy of the indictment found in the United States District Court of Massachusetts and a warrant issued upon complaint of the United States attorney for the District of Maine thereupon for his apprehension and detention pending a hearing. (Rec. 5, par. 6; Rec. 8, par. 13A.)

The appellant, Horn, refused to plead to the indictment before the commissioner, but offered a special plea setting forth his claim to exemption as an officer of the German Army. In support of the plea, he admitted his identity and introduced an affidavit. He also offered evidence which was received as to the state of war between Germany and Great Britain, a photographic copy of his commission, the fact of his arrest by a State officer of Maine

for violation of a State law in connection with blowing up a bridge in Canada, etc. (Rec. 6, 7.) Certain other evidence offered by him was excluded (Rec. 7, 8), viz, (*a*) the fact of war between Germany and Great Britain, and that the bridge was used to transport munitions of war to his country's enemy, and that he was acting as a belligerent soldier; (*b*) evidence relating to pendency of extradition proceedings against him; (*c*) evidence that the United States officials had in their possession certain of his papers and property.

All this evidence was offered, however, to prove his allegations as to his commission of an act of war and his consequent exemption from the operation of the Federal criminal law.

The commissioner overruled the special plea which the appellant in his petition for writ of habeas corpus states was "*supported by affidavit and evidence* that was not controverted, contradicted or denied, and which was therefore conclusive and binding." (Rec. 8, par. 13B.) The commissioner then made an order committing the appellant to the custody of the United States marshal for the District of Maine with the privilege of furnishing bail for his appearance before the district court. (Rec. 9, par. 14.) Circuit Judge Putnam, holding the December term in the United States District Court for the District of Maine, ordered a hearing upon the petition for removal, which was duly served upon the appellant; and after hearing on March 25, 1915, Judge Putnam ordered Horn's removal to the District of Massachusetts.

The allegations of Horn, in his petition for habeas corpus in the district of Massachusetts (Rec. 8, par. 13B), hereinabove set out, conclusively show that he had—at least to his satisfaction—established by evidence which was duly admitted the facts which, as he maintained, entitled him to immunity from arrest for commission of the offense charged under the laws of the United States, and that the exclusion by the commissioner of the further evidence offered could in nowise have operated to his detriment. His contention that the exclusion of other evidence affords grounds now for reversing the action of the United States commissioner in committing him to custody falls by his own concession. The testimony which he offered to adduce as to extradition proceedings and as to the unlawful acts of certain Federal officers was wholly immaterial. Evidently, the commissioner considered the facts set out by the appellant, Horn, in his affidavit, and the evidence introduced by Horn, insufficient to overcome the *prima facie* case made against him by the copy of the indictment and warrant. The evidence offered and excluded could have added no force or weight to that already received and heard by the commissioner and presumably considered by the judge before the order of removal was issued.

Moreover, if, in fact and in law, the action for which he was indicted, viz, the illegal transportation of explosives in or from Massachusetts in interstate commerce, was not an act of war, or if, in law,

no such exemption as he claims existed under international law in behalf of a person not expressly authorized to commit the acts by his Government, then the evidence offered by the prisoner and excluded by the commissioner was rightly excluded as irrelevant.

The case of *Tinsley* v. *Treat* (1907), 205 U. S. 20, relied on by the appellant (Brief, 41, 44, 58), simply decided that evidence tending to show that no offense triable in the Middle District of Tennessee had been committed by the defendant in that district was wrongfully excluded on a removal hearing, the indictment being merely *prima facie* proof. This decision went on the ground that the evidence might have shown a lack of jurisdiction in the court where the indictment was found.

In the case at bar the evidence excluded would not have shown any lack of jurisdiction in the district court for the district of Massachusetts, where the indictment was found.

V.

The allegations of the prisoner in his petition for habeas corpus relating to the refusal of certain United States judges in the District of Maine to entertain another and separate petition for habeas corpus prior to his actual removal to the District of Massachusetts by order of court afford no ground for the issue of the present writ of habeas corpus. Even if the previous petition was wrongfully refused or denied (which we do not admit), such refusal or denial is no reason for the granting of a second distinct petition, when the court to whom the second petition is proffered has clear jurisdiction of the person, and of the crime.

The habeas corpus petition by the prisoner in Maine was an entirely distinct and separate proceeding from the removal proceedings. Whether the prisoner was deprived of any rights under the laws or Constitution of the United States in that separate proceeding, it is impossible to tell from the present record, for the record does not contain a copy of the Maine habeas corpus petition and there is nothing in the record to show whether or not it was in proper form, or the grounds on which it was based, or the grounds on which Judges Putnam and Hale acted.

Even if the prisoner, however, were deprived of any rights in that separate proceeding, such infraction of his right would not deprive the District Court for the District of Massachusetts of jurisdiction to try him, when he was within its district and indicted for a crime of which it could take cognizance.

If there was misconduct of the Federal judges in Maine (which we do not admit) in the prior, separate,

and distinct habeas corpus petition, it can not be cured in this petition. Habeas corpus can not be used as a writ of error or appeal. (*Henry* v. *Henkel* (1914), 235 U. S. 219, 229.) The error, if any, committed by the Federal judges in Maine could only be cured by an application to this court for a writ of mandamus under sections 234 or 236 of the Judicial Code. (*In re Commonwealth of Massachusetts, petitioner* (1905), 197 U. S. 482.)

Judge Morton was entirely correct in holding that (Rec. 21)—

> * * * What the petition complains of is, therefore, not that there is a defect in the removal proceedings apparent upon the record, but that the judicial officers of the United States in the district of Maine, in the removal and attempted habeas corpus proceedings there, erroneously and illegally deprived him of rights to which he was entitled. It is not the business of this court to revise or correct judicial proceedings in the district of Maine. It has no power to do so.

And the Circuit Court of Appeals affirmed this in holding (Rec. 30):

> We agree with the contention of the United States attorney that if the present petition can not be maintained on its merits it is immaterial whether an earlier petition to the same unmeritorious effect was or was not erroneously refused consideration.

If we should assume, for the purpose of the argument, that the action of the Federal judges in Maine

in refusing to hear the prisoner's previous petition for habeas corpus was wrongful, and that thereby he was unlawfully removed from Maine, this alone would not afford ground for his release, provided the court in whose jurisdiction he now is, is competent to try him on the present indictment. To send the prisoner back to Maine simply that the Federal judges might now listen to argument on a petition setting up the same grounds of immunity as the present petition, would be an empty form. It would not even accomplish what this court allowed in *Tinsley* v. *Treat* (1907), 205 U. S. 20, 33, where the court discharged the prisoner from custody, but "without prejudice to a renewal of the application to remove," for in that case the prisoner had not been actually removed prior to the decision of this court.

As was stated in *Ex parte Royall* (1886), 117 U. S. 241, 250:

> If, however, it is apparent upon the petition, that the writ if issued ought not, on principles of law and justice, to result in the immediate discharge of the accused from custody, the court is not bound to award it as soon as the application is made.

VI.

The appellant now being within the jurisdiction of the court in which the indictment against him was found and having been removed thereto under due form of law, must stand for trial within that district.

See—

Pettibone v. *Nichols* (1906), 203 U. S. 192;
Mahon v. *Justice* (1888), 127 U. S. 700;
Kelly v. *Griffin* (1916), 241 U. S. 6.

The above were cases of extradition from one State to another or from one country to another.

The case at bar is simply one of removal from one Federal district to another, where "the full protecting power of the United States is continued after the removal from the place of arrest to the place of trial." (*Beavers* v. *Henkel* (1904), 194 U. S. 73,83.)

The prisoner in his petition for habeas corpus asks that he "may be discharged from the custody and imprisonment aforesaid." If he should be discharged, however, in Massachusetts, it is clear that the marshal might immediately rearrest him; for, being in Massachusetts, he is within the jurisdiction of a court competent to try him, regardless of what happened previously in Maine. In other words, his position would be like that of one who walks out of a revolving storm door, and continues on, only to find himself walking in again. In the language of Mr. Justice Holmes in *Kelly* v. *Griffin*, supra:

> This proceeding is not a fox hunt. But merely to be declared free in a room with the

marshal standing at the door having another warrant in his hand would be an empty form.

CONCLUSION.

The Circuit Court of Appeals was correct in holding that the grounds on which the prisoner contested the jurisdiction of the commissioner were without substantial merit; he has had a full hearing upon the merits of his claim to immunity from trial upon the indictment; and the judgment of the Court of Appeals should be affirmed, or this appeal dismissed for want of jurisdiction in this court.

CHARLES WARREN,
Assistant Attorney General.

JANUARY, 1917.

○